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Supreme Court, U.S.
FILED

No. (1)
08-516 OCT 16 2008

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In The
Supreme Court of the United States

CITY OF SARALAND, ALABAMA,
and FRANK MANN,

Petitioners,

v.

MICHAEL PARDUE,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether there exists a claim for "malicious prosecution" under 42 U.S.C. § 1983 based on an alleged violation of the Fourth Amendment, and, if so, is the accrual of such a claim controlled by the state law elements of malicious prosecution or by federal law as defined by the holding in *Heck v. Humphrey*, 512 U.S. 477 (1994).

2. Whether Respondent's remaining claims under 42 U.S.C. § 1983 for alleged violations of the Fifth and Fourteenth Amendments are subject to the same state law accrual analysis applied by the Eleventh Circuit to the § 1983 malicious prosecution claim in conflict with this Court's holding in *Heck v. Humphrey*, 512 U.S. 477 (1994).

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Eleventh Circuit.

The Petitioners here and Appellees/Defendants below are Frank Mann and the City of Saraland, Alabama.

Additional Appellees/Defendants below, who are not parties to this petition, are Willis Holloway, Marion Sennett, James Hendrix, Charles Graddick, Mike Davis, and Tom Harrison.

The Appellant below and Respondent here is Michael R. Pardue.

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PETITION FOR WRIT OF CERTIORARI

Petitioners City of Saraland, Alabama and Frank Mann respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reproduced in the Appendix at App. 1-2. The Order of the District Court on summary judgment is reproduced in the Appendix at App. 3-20.

JURISDICTION

On May 27, 2008, the Eleventh Circuit entered judgment. The City of Saraland, Alabama and Frank Mann filed a timely petition for rehearing *en banc* on June 16, 2008. The Eleventh Circuit entered an order denying the petition on July 22, 2008. Appendix at App. 124-125. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent Michael Pardue seeks damages for alleged violations of his Fourth, Fifth, and Fourteenth Amendment rights pursuant to 42 U.S.C.

§ 1983. The full text of these constitutional and statutory provisions is set out in the Appendix at App. 126-128.

STATEMENT OF THE CASE

I. Introduction

The question of the existence of a § 1983 malicious prosecution claim continues to divide the Courts of Appeal and the confusion regarding the constituent elements of such a claim creates further disorder in the lower courts as to the accrual of these § 1983 claims. The decisions of the Eleventh Circuit regarding § 1983 malicious prosecution claims are in conflict with *Heck v. Humphrey*, 512 U.S. 477 (1994) as to the accrual of § 1983 claims asserted against law enforcement officers and governmental entities. More specifically, the adoption of the state law elements for malicious prosecution into the similarly denominated constitutional claim brought pursuant to § 1983 creates a "favorable termination" requirement that directly conflicts with the holding in *Heck v. Humphrey*. As a result, this case presents an opportunity to resolve both of these important issues of federal law.

The facts and legal issues in this case highlight the split in the lower courts concerning the existence of § 1983 malicious prosecution claims and, for those who recognize the cause of action, the uncertainty in determining the proper time for the accrual of such

claims. Although the opinion in *Wallace v. Kato*, ___ U.S. ___, 127 S. Ct. 1091, 166 L. Ed. 2d 973 (2007), clarified the time for the accrual of § 1983 claims based on false imprisonment allegations and also clarified that the accrual of federal claims is a question of federal law, there are still substantial issues which remain unresolved in the context of a § 1983 malicious prosecution claim. A resolution of the questions presented in this case will assist litigants and lower courts alike.

II. The Facts

The facts giving rise to this lawsuit begin with the murders of Ronald Rider in Baldwin County, Alabama and Will Harvey Hodges in Mobile County, Alabama during the early morning hours of May 22, 1973. (App. 31). Respondent Michael Pardue was seventeen years old at the time and, after confessing to these murders, was convicted by a jury in Baldwin County on August 14, 1973. (App. 22, 31, 36). Pardue then entered a guilty plea to the murder of Hodges in Mobile County on October 24, 1973. (App. 37).

Pardue later filed a *habeas* proceeding in the United States District Court for the Southern District of Alabama as to his Baldwin County conviction. On November 26, 1991, the District Court entered an Order and separate Judgment granting Pardue *habeas corpus* relief and allowing an out-of-time appeal with assistance of counsel. (Doc. 243, Folder 6, Ex. 4-A). After pursuing his out-of-time appeal on the

Baldwin County conviction, Pardue obtained a reversal of that conviction from the Alabama Supreme Court on September 2, 1994. (Doc. 243, Folder 6, Ex. 4-C). The State of Alabama filed for a rehearing of that appeal, which was denied on January 13, 1995. (Doc. 243, Folder 6, Ex. 4-C). On August 25, 1997, the State of Alabama filed a motion to *nolle prosequi* the charge against Pardue for the murder of Ronald Rider in Baldwin County and the Circuit Court granted that motion on August 29, 1997. (Doc. 243, Folder 6, Ex. 3).

Pardue also filed for *habeas* relief in the United States District Court for the Southern District of Alabama from his conviction for the Mobile County murder of Hodges. On December 16, 1994, the District Court entered an Order and Judgment granting Pardue's *writ of habeas corpus* as to the Mobile County conviction allowing him to withdraw his guilty plea. (Doc. 243, Folder 6, Ex. 5).

Pardue was re-indicted by a Mobile County Grand Jury and tried in May of 1995 for the murder of Hodges. (Doc. 243, Folder 6, Ex. 7). Pardue was found guilty by a jury and filed an appeal to the Alabama Court of Criminal Appeals. (Doc. 243, Folder 6, Ex. 7). On appeal, the Alabama Court of Criminal Appeals determined that the tape-recorded confession was inadmissible and reversed the conviction on August 23, 1996. (Doc. 243, Folder 6, Ex. 7). The State of Alabama filed a petition for writ of certiorari to the Alabama Supreme Court, which was denied on May 16, 1997. (Doc. 243, Folder 6, Ex. 7). On June 25,

1997, the State filed a motion to *nolle prosequi* the charges against Pardue in Mobile County for the murder of Hodges. (Doc. 243, Folder 6, Ex. 8). The Circuit Court granted the motion that same day. (Doc. 243, Folder 6, Ex. 8). The District Attorney indicated in the motion to *nolle prosequi* the Mobile County indictments that he filed the motion, not because of a determination that Pardue was innocent; rather, because of the passage of time, loss of evidence and witnesses and the effect of the appellate decisions, he made a determination that insufficient evidence existed as of 1997 for a successful prosecution of the 1973 crimes. (Doc. 243, Folder 6, Exhibit 8, Motion to *Nolle Prosequi* Indictments).

Pardue filed the instant lawsuit on June 25, 1999. (Doc. 1). On November 9, 1999, Pardue filed an amended complaint asserting various tort claims under Alabama law as well as claims for alleged violations of his Fourth, Fifth, Eighth, and Fourteenth Amendment rights pursuant to 42 U.S.C. § 1983. (Doc. 52).

In 1973, Frank Mann was a lieutenant with the Saraland Police Department. (Doc. 243, Folder 6, Ex. 10). Pardue alleges in his amended complaint that Frank Mann was involved in coercing his confession, withholding exculpatory evidence, and fabricating evidence against him. Frank Mann specifically denies these allegations. (Doc. 243, Folder 6, Ex. 10).

III. District Court Orders and Eleventh Circuit Opinion

Pardue asserted claims against numerous individuals and governmental entities he claimed were involved in his prosecution and convictions. Most of these defendants filed motions to dismiss. However, Frank Mann and the City of Saraland only filed motions to dismiss addressing the state law claims asserted in the amended complaint and did not initially address the federal claims. (Docs. 70 and 71). On May 30, 2001, the District Court entered a lengthy order addressing the various motions to dismiss filed by all defendants.[1] (App. 21-123). In that order, the Court denied Mann's motion to dismiss the state law malicious prosecution claims based on the statute of limitation.[2] (App. 95-99). In its order

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[1] The Honorable Richard Vollmer was the United States District Judge presiding over this case initially, but he died during the course of this litigation and the case was subsequently reassigned to the Honorable Callie V.S. Granade. The initial order addressing the various motions to dismiss was entered by Judge Vollmer.

[2] The two-year limitation period for a state law malicious prosecution claim in Alabama is controlled by *Ala. Code* § 6-2-38(h), while the two-year statute of limitation for § 1983 claims in Alabama is contained in the general personal injury limitation provision at *Ala. Code* § 6-2-38(l). See *Owens v. Okure*, 488 U.S. 235, 249-250, 109 S. Ct. 573, 102 L. Ed. 2d 594 (1989) (the proper statute of limitation for § 1983 actions is the forum state's general or residual statute of limitation for personal injury actions); see also *Lufkin v. McCallum*, 956 F.2d 1104, 1105 (11th Cir. 1992) (applying *Ala. Code* § 6-2-38(l) to § 1983 claims in Alabama).

addressing the statute of limitation argument raised by the defendants at the motion to dismiss stage, the District Court determined that the state law malicious prosecution claims could not have been filed until the criminal charges against Pardue were *nolle prossed*. (App. 95-99).

After conducting discovery, the parties filed motions for summary judgment and on August 11, 2004, the District Court entered an order granting summary judgment for each of the remaining defendants as to all claims asserted under 42 U.S.C. § 1983. (App. 3-20). In the order granting summary judgment, the District Court determined that Pardue's § 1983 claims were barred by the applicable two-year statute of limitation. The District Court determined, in accordance with the holding in *Heck v. Humphrey*, that Pardue's § 1983 claims accrued more than two years prior to the filing of his complaint and were thus barred by the applicable two-year statute of limitation.[3]

Without explanation, the Eleventh Circuit panel decision vacated the summary judgment order and simply stated "We agree with Judge Vollmer's original ruling that Pardue could not have filed his § 1983

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[3] Judge Granade followed the holding of *Heck* in determining that accrual occurred when the convictions were invalidated by the 1992 and 1994 orders granting writs of habeas corpus; yet, even if a different application of *Heck* was followed, accrual could not have occurred *later* than the August 23, 1996 reversal by the Alabama Court of Criminal Appeals of the 1995 conviction.

claims before the charges were *nolle prossed*." (App. 2). In other words, the Eleventh Circuit adopted the state law rule for the accrual of malicious prosecution claims and improperly applied that rule to the accrual of the § 1983 claims in this case. Petitioners contend that the Eleventh Circuit's creation of a § 1983 malicious prosecution claim based on the Fourth Amendment, which adopts the state law elements of malicious prosecution, creates the underlying confusion regarding the appropriate basis for determining the accrual of these § 1983 claims.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT THE WRIT OF CERTIORARI AND REVIEW THIS CASE BECAUSE THERE EXISTS A DISTINCT SPLIT AMONG THE CIRCUIT COURTS OF APPEAL REGARDING THE EXISTENCE OF A SECTION 1983 MALICIOUS PROSECUTION CLAIM WHICH HAS CREATED FURTHER CONFUSION OVER THE ACCRUAL OF THESE CONSTITUTIONAL CLAIMS AND THE PROPER APPLICATION OF THE STATUTE OF LIMITATION IN ACCORDANCE WITH *HECK V. HUMPHREY*.

There exists a distinct conflict among the United States Courts of Appeal regarding the existence, *vel non*, of a claim for "malicious prosecution" under 42 U.S.C. § 1983. Because the Eleventh Circuit holds that a § 1983 malicious prosecution claim must be

based on an alleged violation of the Fourth Amendment and contains the constituent elements of a state law malicious prosecution tort, there exists an inherent tension between the holding of this Court in *Heck v. Humphrey* and the decisions of the Eleventh Circuit indicating that the accrual of these § 1983 claims is dependent on state law as opposed to federal law.

I. The Split Among the Circuits Regarding the Existence of a § 1983 Malicious Prosecution Claim Continues to Create Confusion in § 1983 Jurisprudence

Although case law from the Eleventh Circuit indicates that a § 1983 malicious prosecution claim finds its genesis in the Fourth Amendment, *Wood v. Kesler*, 323 F.3d 872 (11th Cir. 2003), there is a split among the Circuits on this issue without any resolution from this Court. See *Castellano v. Fragozo*, 352 F.3d 939 (5th Cir. 2003), *cert. denied*, 543 U.S. 808, 125 S. Ct. 31, 160 L. Ed. 2d 10 (2004) (noting division among various circuit courts of appeal relating to existence, *vel non*, of § 1983 malicious prosecution claim.)

In *Albright v. Oliver*, a plurality of this Court determined that a § 1983 malicious prosecution claim would not find its support in an alleged substantive due process violation. *Albright v. Oliver*, 510 U.S. 266, 275, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994). In a footnote in *Albright,* the Court noted that this § 1983 malicious prosecution issue is one "on which there is

an embarrassing diversity of judicial opinion." *Albright v. Oliver*, 510 U.S. 266, 270 n.4, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994); see also, *Campbell v. Brummett*, 946 F.2d 1178 (5th Cir. 1991), *cert. denied*, 504 U.S. 965, 112 S. Ct. 2323, 119 L. Ed. 2d 241 (1992) (WHITE, J., dissenting). Although this issue continues to percolate in the lower appellate courts, it has thus far evaded any specific resolution. More recently, the Court noted that it has "never explored the contours of a Fourth Amendment malicious prosecution suit under § 1983." *Wallace v. Kato*, ___ U.S. ___, 127 S. Ct. 1091, 1096 n.2, 166 L. Ed. 2d 973 (2007).

The Eleventh Circuit holds that a § 1983 malicious prosecution claim can be based upon an alleged Fourth Amendment violation. *Whiting v. Traylor*, 85 F.3d 581, 584 (11th Cir. 1996). Arguably extending the reach of the Fourth Amendment to meet its definition of a § 1983 malicious prosecution claim, the Eleventh Circuit states:

> Labeling . . . a § 1983 claim as one for a "malicious prosecution" can be a shorthand way of describing a kind of legitimate § 1983 claim: the kind of claim where the plaintiff, as part of the commencement of a criminal proceeding, has been unlawfully and forcibly restrained in violation of the Fourth Amendment and injuries, due to that seizure, follow as the prosecution goes ahead.

Whiting v. Traylor, 85 F.3d 581, 584 (11th Cir. 1996).

The Eleventh Circuit reasons that where a plaintiff is unlawfully seized, and that seizure follows and derives from a criminal prosecution itself, the Fourth Amendment violation for which the plaintiff seeks compensation "is of the kind making a § 1983 claim based on the violation analogous to the tort of malicious prosecution," and the "injuries caused by the unlawful seizure may include those associated with the prosecution." *Id.* at 585-586. Thus, in order for the seizure to derive from the prosecution, the plaintiff must show he was seized "in relation to" the malicious prosecution. *Kingsland v. City of Miami*, 382 F.3d 1220, 1235 (11th Cir. 2004).

According to Eleventh Circuit case law, for a plaintiff to prevail on a § 1983 malicious prosecution claim, he must prove (1) the elements of the common law tort of malicious prosecution, (2) an unlawful seizure in violation of his Fourth Amendment rights, and (3) that the unlawful seizure was "in relation to the prosecution." *Kingsland*, 382 F.3d at 1234-1235. Although the Eleventh Circuit seems to allow a § 1983 malicious prosecution claim and the recovery of damages based on an alleged violation of the Fourth Amendment even after the point of arrest, the Court does not expressly adopt the "continuing seizure" theory. See *Whiting v. Traylor*, 85 F.3d 581, 584 (11th Cir. 1996) (noting questions about "continuing seizure" theory but failing to reach a conclusion on the issue).

The awkward attempt by the Eleventh Circuit to define a § 1983 malicious prosecution claim based on

a Fourth Amendment violation is but one among a variety of different approaches to this issue. See *Nieves v. McSweeney,* 241 F.3d 46 (1st Cir. 2001) (requiring some elements of the common law tort of malicious prosecution and violation of a "federally protected right"); *Singer v. Fulton County Sheriff,* 63 F.3d 110 (2d Cir. 1995) (finding § 1983 malicious prosecution claim to exist where there is tortious conduct and injury caused by the deprivation of liberty guaranteed by the Fourth Amendment); *Donahue v. Gavin,* 280 F.3d 371 (3d Cir. 2002) (finding § 1983 malicious prosecution claim based on common law tort elements and Fourth Amendment seizure or Fourteenth Amendment procedural due process violation); *Lambert v. Williams,* 223 F.3d 257 (4th Cir. 2000) (curiously stating "there is no such thing as a '§ 1983 malicious prosecution' claim," but determining that a "malicious prosecution claim under § 1983 is properly understood as a Fourth Amendment claim for unreasonable seizure which incorporates certain elements of the common law tort."); *Castellano v. Fragozo*, 352 F.3d 939 (5th Cir. 2003) (finding no constitutional right to be free from "malicious prosecution" and requiring § 1983 plaintiffs to ground constitutional claims in a specific constitutional provision); *Thacker v. City of Columbus,* 328 F.3d 244 (6th Cir. 2003) (noting that circuit has yet to resolve the elements of a federal malicious prosecution claim); *Newsome v. McCabe,* 256 F.3d 747 (7th Cir. 2001) (refusing to recognize federal claim of malicious prosecution); *Pace v. City of Des Moines,* 201 F.3d 1050 (8th Cir. 2000) (stating that malicious

prosecution alone is insufficient to state § 1983 claim without underlying constitutional violation, but failing to further define claim with any specificity); *Awabdy v. City of Adelanto,* 368 F.3d 1062 (9th Cir. 2004) (broadly defining § 1983 malicious prosecution claim as including deprivation of equal protection of the law or otherwise subjecting a person to a denial of constitutional rights); *Becker v. Kroll,* 494 F.3d 904 (10th Cir. 2007) (recognizing § 1983 malicious prosecution claims based on Fourth or Fourteenth Amendments depending on what stage in the prosecutorial process the alleged violations occurred). Each of these circuit courts of appeal seems to address the question in a different manner. In addition, the fact that the Eleventh Circuit simply adopts the state law elements for malicious prosecution making this constitutional claim dependent on each particular state's definition of the common law tort seems to implicate elements of federalism. It is not clear that it is appropriate to engraft, *in toto,* state law elements of a common law tort in order to define the federal common law relating to § 1983 claims.

The confusion regarding the accrual of § 1983 claims analogized to the common law tort of malicious prosecution arises from the favorable termination element of that common law tort. Under Alabama law, the elements to establish a state law malicious prosecution tort claim are: (1) a criminal prosecution instituted or continued by the present defendant; (2) the defendant acted without probable cause in the prior proceeding; (3) the defendant acted with malice

in instituting the prior proceeding; (4) the prior proceeding terminated in favor of the plaintiff; and (5) the plaintiff was damaged. *Wood v. Kesler,* 323 F.3d 872, 881-882 (11th Cir. 2003); *U.S. Steel, LLC v. Tieco, Inc.,* 261 F.3d 1275, 1290 (11th Cir. 2001). It is not simply the lower court's adoption of these common law elements in the § 1983 context that creates the accrual problem; it is the interpretation that the favorable termination element requires that the underlying criminal charges be *nolle prossed* before the claim can accrue that is at odds with the holding in *Heck.*

Allowing § 1983 plaintiffs to cast their claims under the rubric of malicious prosecution is more confusing than helpful because a § 1983 claim must necessarily be grounded in a violation of a specific constitutional provision. While drawing from the common law of torts is sometimes helpful in further defining the parameters of § 1983 claims, the use of the phrase "malicious prosecution" to describe these claims is inappropriate because a constitutional claim asserted under § 1983 is not identical to the common law tort of malicious prosecution.

The reasoning of the Fifth Circuit in *Castellano* is helpful in demonstrating that courts must get back to basic principles when discussing the parameters of constitutional claims asserted under 42 U.S.C. § 1983. In *Castellano*, the Fifth Circuit correctly states that a § 1983 plaintiff must ground a constitutional claim in a specific constitutional provision and merely describing a § 1983 claim through the use

of common law tort descriptors is not sufficient. While the Fourth Amendment is the appropriate vehicle to address excessive force and false imprisonment-type claims, it is not appropriate to try and extend the protections of that amendment beyond its intended scope to encompass a malicious prosecution-type claim under § 1983. Petitioners contend that because there exists a state law malicious prosecution tort claim which can serve as an appropriate post-deprivation remedy, there exists no § 1983 malicious prosecution claim. *Albright v. Oliver,* 510 U.S. 266, 281-286, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994) (KENNEDY, J., and THOMAS, J., concurring in the judgment) (citing *Parratt v. Taylor,* 451 U.S. 527, 535-544, 101 S. Ct. 1908, 1912-1917, 68 L. Ed. 2d 420 (1981)).

The disarray among the circuits over the existence and definition of a § 1983 malicious prosecution claim merits granting the *writ of certiorari* in this case to resolve this confusion. Petitioners urge this Court to grant the *writ* in this case for another important reason. Even if this Court determines that there exists a Fourth Amendment § 1983 malicious prosecution claim, or, alternatively, decides to let that issue stand in its current unresolved status, the Court should still grant the writ to clarify the proper analysis for the accrual of these federal claims.

II. The Eleventh Circuit's Adoption of the State Law "Favorable Termination" Requirement for the Accrual of § 1983 Claims Is in Direct Conflict with *Heck v. Humphrey*

Confusion surrounding the explication of § 1983 malicious prosecution claims has resulted in the Eleventh Circuit's adoption of a rule of accrual for this type of § 1983 claim that is at odds with the holding in *Heck v. Humphrey,* 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994). In *Heck*, this Court reviewed the claims of a § 1983 plaintiff who filed suit following his conviction for murdering his wife. *Heck v. Humphrey,* 512 U.S. 477, 479 (1994). Like the present case, the plaintiff in *Heck* filed suit seeking money damages and asserted claims against the investigators and prosecutors involved in his case. *Id.* Since Roy Heck was still a convicted prisoner, the Court discussed the intersection of claims brought under 42 U.S.C. § 1983 and those pursued under the *habeas corpus* statute, 28 U.S.C. § 2254.

Analogizing the plaintiff's claim in *Heck* to the common law tort of malicious prosecution, the Court determined that certain § 1983 claims do not accrue unless and until the underlying conviction is invalidated. *Heck*, 512 U.S. at 487. Finding that civil tort actions are not the appropriate method for challenging the validity of a criminal conviction, the Court in *Heck* stated:

> We hold that, in order to recover damages for allegedly unconstitutional conviction or

> imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove **that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a *writ of habeas corpus*, 28 U.S.C. § 2254**. *Heck v. Humphrey*, 512 U.S. at 486-487 (footnote omitted) (emphasis added).

Thus, when evaluating the accrual date of a § 1983 claim, a court "must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Heck*, 512 U.S. at 486-487.

By adopting wholesale the state law elements of a malicious prosecution claim into an analogous § 1983 claim, the Eleventh Circuit has improperly engrafted a state law accrual provision into a federal claim. Section 1983 is not itself a source of substantive rights; § 1983 claims must be based on an explicit source of protection in the Constitution against a particular sort of governmental behavior. *Albright v. Oliver*, 510 U.S. at 273. Using the label malicious prosecution to define these constitutional claims is inappropriate and more confusing than helpful. The Court in *Heck* merely analogized to the common law

tort of malicious prosecution to provide some conceptual guidance when evaluating § 1983 claims that would imply the invalidity of a criminal conviction; however, nowhere in *Heck* did the Court indicate that state law rules for accrual should be applied to these claims.

By adopting the state law "favorable termination" requirement for the accrual of state law malicious prosecution claims into § 1983 analysis, the Eleventh Circuit has gone far beyond the clear holding in *Heck* as to when these federal claims accrue. The favorable termination accrual interpretation imposed by the Eleventh Circuit based on the state law requirement of a final termination of the criminal prosecution before bringing a malicious prosecution claim is impractical and inconsistent with *Heck*.

Another decision of the Eleventh Circuit provides a good example of its divergence from the holding in *Heck*. In *Kelly v. Serna*, 87 F.3d 1235 (11th Cir. 1996), the plaintiff asserted a *Bivens* action against DEA agents alleging that they violated his constitutional rights as a result of his arrest and prosecution on drug charges. The District Court in that case granted summary judgment to the defendants based on the two-year statute of limitation because the plaintiff filed his claims more than two years after the date of the reversal of his underlying criminal conviction. *Kelly v. Serna,* 87 F.3d 1235, 1237 (11th Cir. 1996). The plaintiff appealed and one of the issues reviewed by the Eleventh Circuit was whether the statute of limitation started to run as of the date of reversal of

the criminal conviction or upon the expiration of the time for the government to file for certiorari challenging that reversal. *Kelly*, 87 F.3d at 1239.

The Eleventh Circuit held that reversal, within the meaning of *Heck*, occurred as of the date of the appellate decision reversing the conviction, but then went on to state that a " . . . claim accrues on the date a court of appeals of competent jurisdiction reverses a conviction *and no re-trial is permitted.*" *Kelly*, 87 F.3d at 1240 (footnotes omitted) (emphasis added). This highlighted dicta from the Eleventh Circuit is further evidence of the confusion wrought by the inclusion of the state law elements of malicious prosecution into these federal constitutional claims. This misreading of the holding in *Heck* continues to confound the accrual issue.

Other circuits also continue to wrestle with the analysis for the accrual of these § 1983 malicious prosecution-type claims. See *Eidson v. State of Tennessee Dept. of Children's Services*, 510 F.3d 631 (6th Cir. 2007) (discussion of accrual of § 1983 malicious prosecution-type claim in light of holdings in *Heck* and *Wallace*); see also *Mondragon v. Thompson*, 519 F.3d 1078 (10th Cir. 2008) (remanding case to District Court for determination of accrual dates of § 1983 claims based on false arrest and malicious prosecution analysis); *Washington v. Summerville*, 127 F.3d 552, 559 (7th Cir. 1997) (holding entry of *nolle prosequi* of underlying criminal charge not favorable termination sufficient to support malicious prosecution claim under state or federal law). The Eleventh

Circuit's adoption of state law rules of accrual for § 1983 claims extends beyond the teaching of this Court in *Heck* and imposes a "final termination" requirement distinctly different than the holding of *Heck*.

In *Wallace v. Kato*, the Court addressed the accrual of § 1983 claims in light of its prior holding in *Heck v. Humphrey*. In that case, the plaintiff alleged facts similar to those in the present case. The plaintiff was a minor who confessed to murder while detained in a Chicago Police Station and was subsequently convicted. *Wallace v. Kato*, 127 S. Ct. 1091, 1094 (2007). The plaintiff in *Wallace* later had his conviction overturned and filed § 1983 claims against various defendants. *Id.* The Supreme Court in *Wallace* was required to determine the accrual of the § 1983 claim and apply the applicable statute of limitation.

The Court specifically stated that the accrual of § 1983 claims is a federal law issue that is not resolved by reference to state law. *Wallace v. Kato*, 127 S. Ct. at 1095. The claims in *Wallace* were described as false arrest or false imprisonment claims under § 1983 and the Court determined that those claims accrued when the plaintiff was bound over by legal process. *Wallace,* 127 S. Ct. at 1097. Because the plaintiff in *Wallace* filed his suit more than two years after he was bound over by legal process, the Supreme Court determined that his § 1983 claim was time barred. *Id.* Although the claims in *Wallace v. Kato* were not alleged as malicious prosecution claims

under § 1983, the Court's discussion of its prior holding in *Heck v. Humphrey* is instructive.

The Court in *Wallace* states that "The *Heck* rule for deferred accrual is called into play only where there exists 'a conviction or sentence that has *not* been . . . invalidated,' that is to say, an 'outstanding criminal judgment.'" *Wallace,* 127 S. Ct. at 1097-1098. (emphasis in original). More specifically, the Court stated that the *Heck* rule "delays what would otherwise be the accrual date of a tort action until the setting aside of *an extant conviction* which success in that tort action would impugn." *Wallace,* 127 S. Ct. at 1097-1098 (emphasis in original). The Court also instructed that the focus of the inquiry should not be on the possibility of some anticipated future conviction as that requirement would go beyond the accrual rule announced in *Heck*. *Wallace v. Kato*, 127 S. Ct. 1091, 1098 (2007).

The *Heck* Court explicitly provided four possible triggers for the accrual of § 1983 claims such as those alleged by Pardue in this case. Although the claims in *Heck* were analogized to malicious prosecution claims just as Pardue's are in this case, the Court in *Heck* did not include the entry of *nolle prosequi* as one of those possible triggers for accrual. The proper focus is whether the underlying criminal conviction has been invalidated by one of the methods outlined in *Heck*. Once the extant conviction is invalidated by a direct reversal on appeal or by being called into question by the issuance of a *writ of habeas corpus*, the claim accrues and the limitation period starts running.

Whether there existed the possibility of some future conviction should not defer the accrual of any § 1983 claims that were related to the conviction that had already been invalidated. *Heck v. Humphrey,* 512 U.S. at 486-487; *Wallace v. Kato*, 127 S. Ct. at 1097-1098.

Once the criminal conviction is overturned on appeal, the § 1983 claim accrues in accordance with *Heck.* The mere fact that there could be a new trial on the same criminal charge and the possibility of a subsequent conviction does not pose any conflict with a potential verdict in the § 1983 lawsuit. In other words, the § 1983 claim challenging the allegedly unlawful conduct leading to the initial conviction is ripe upon reversal because the allegedly unlawful actions or evidence leading to the initial conviction are resolved in favor of the plaintiff at that point. Any subsequent retrial would not be tainted with the same unconstitutional conduct or evidence and therefore could not be in conflict with a § 1983 suit. In the present case, when the Alabama appellate court reversed Pardue's conviction and held that his tape-recorded confession was inadmissible, any § 1983 claim relating to the use of that confession accrued and the statute of limitation started running. The tape-recorded confession could not have been used against him again after that reversal.

Once Pardue's existing criminal conviction was set aside by the *habeas* relief or at the latest, upon reversal by the Alabama appellate courts, any cause of action related to that conviction would have accrued. The holding in *Heck* states that a § 1983 claim

that would imply the invalidity of the underlying criminal conviction accrues when that extant conviction is invalidated, regardless of whether that claim is a § 1983 "malicious prosecution" claim or an alleged violation of the Fifth or Fourteenth Amendment. To hold that these § 1983 claims cannot accrue until the underlying criminal charges are *nolle prossed* is a contortion of the holding in *Heck*. The Baldwin County murder conviction was reversed by the Alabama Supreme Court on September 2, 1994. Although he entered a guilty plea to the Mobile County murder in 1973, Pardue's 1995 conviction on that charge was reversed by a direct appeal on August 23, 1996. Since Pardue's § 1983 suit was not filed until June 25, 1999, his § 1983 claims are barred by the two-year statute of limitation.

Since the Eleventh Circuit appears to diverge from Supreme Court precedent requiring the application of federal law to the accrual of these federal claims, the Court should provide some guidance to these litigants and any future § 1983 litigants about the application of this important rule of accrual. Without such guidance, the parties in this case and other future cases will be left to guess at the appropriate basis for the determination of the accrual of similar § 1983 claims because the Eleventh Circuit relies on a rule inconsistent with the holding in *Heck*.

III. A Ruling in This Case Will Promote Consistency in an Important Area of Federal Law

The body of federal case law interpreting claims pursued under 42 U.S.C. § 1983 continues to grow, but the specific issues raised in this Petition continue to find inconsistent results among the Circuit Courts of Appeal and other lower courts. Police officers, prosecutors and other law enforcement officials need to know the scope of their potential liability for constitutional violations; yet, courts continue to allow § 1983 claims based on an allegation of "malicious prosecution" without any serious explication of the underlying constitutional right allegedly violated. This recurring problem needs a resolution.

In addition, § 1983 plaintiffs and defendants both need to know the applicable statute of limitation for pursuing these constitutional claims. In *Heck* and *Wallace* this Court set out clear rules for determining the accrual of § 1983 claims against law enforcement officials. Unfortunately, the adoption of the state law elements for malicious prosecution into these constitutional claims has created an accrual rule different from the holding in *Heck*.

There are significant public policy reasons for granting the writ in this case. As outlined above, courts and litigants alike will benefit from a decision in this case. Parties need to know when these § 1983 claims accrue and they also need to know the proper elements that define these constitutional claims. A

ruling in this case will assist courts and litigants at all stages of the process. When the parties know the actual elements of the claim, they can draft more precise pleadings, focus their efforts better during discovery, deal with dispositive motions in a more complete way, discuss potential settlement in a more educated manner, and provide better instructions to a jury when necessary. These recurring issues will continue to create confusion in the lower courts until further guidance from this Court.

CONCLUSION

Due to the existing uncertainty regarding the proper scope and accrual of these federal claims, litigants who pursue and defend against these § 1983 claims need a resolution of these issues that can only be given by this Court. A resolution of these questions would obviously have national implications and would resolve the uncertainty and confusion in the lower courts.

For these reasons, Petitioners Frank Mann and the City of Saraland, Alabama respectfully request that the decision of the Eleventh Circuit vacating the District Court's Order granting summary judgment based on the statute of limitation be reversed, or alternatively, that a *writ of certiorari* be granted.

Respectfully submitted,

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APPENDIX A

APPENDIX A

[DO NOT PUBLISH]

IN THE UNTIED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-14757

D. C. Docket No. 99-00799 CV-CG-M

MICHAEL R. PARDUE,

Plaintiff-Appellant,

versus

MOBILE COUNTY, AL,
SARALAND, CITY OF, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Alabama

(May 27, 2008)

Before DUBINA and BARKETT, Circuit Judges, and SCHLESINGER,* District Judge.

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* Honorable Harvey E. Schlesinger, United States District Judge for the Middle District of Florida, sitting by designation.

PER CURIAM:

Appellant, Michael Pardue, appeals the district court's order dismissing his 42 U.S.C. § 1983 and pendent state law claims against Mobile County, Baldwin County, the City of Saraland, and various individual defendants employed by those governmental entities. Pardue also challenges an earlier district court order which dismissed several defendants based on absolute prosecutorial immunity. After reviewing the record, reading the parties' briefs, and having the benefit of oral argument, we vacate the district court's orders and remand this case for further proceedings consistent with this opinion.

First, concerning the statute of limitations argument, we agree with Judge Vollmer's original ruling that Pardue could not have filed his § 1983 claims before the charges were *nolle prossed.* Moreover, because we believe that the allegations contained in the complaint against the prosecutors should more appropriately be determined on a motion for summary judgment, we vacate the district court's orders and remand this case.[1]

VACATED and REMANDED.

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[1] We also vacate the district court's dismissal of the pendent claims.

APPENDIX B

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

MICHAEL PARDUE,	)	
Plaintiff,	)	
vs.	)	**CIVIL ACTION NO. 99-0799-CG-M**
CITY OF SARALAND, AL., *et al.*,	)	
Defendants.	)	

ORDER

This cause is before the court on defendants Sennett and Holloway's motion for summary judgment, brief in support, plaintiff's response, and defendants Sennett and Holloway's response (Docs. 224, 225, 259, 265); plaintiff's motion for summary judgment on liability, brief in support, defendants Sennett and Holloway's response, defendants Frank Mann and City of Saraland's response, and plaintiff's reply (Docs. 231, 256, 267, 270, 276); and defendants Frank Mann and City of Saraland's motion for summary judgment, brief in support, plaintiff's response, and defendants Frank Mann and City of Saraland's response (Docs. 239, 255, 273, 275).

I. BACKGROUND[1]

As noted by the late Judge Vollmer in his order of May 30, 2001, this "action constitutes yet another chapter in the long-running saga of plaintiff Michael Pardue's extensive contacts with the state and federal courts in Alabama". (Doc. 126) (citations omitted). In 1973, a jury convicted Pardue of murder in Baldwin County, Alabama. Soon thereafter, Pardue pleaded guilty to two other murders in Mobile County, Alabama. On November 18, 1992, this court issued a writ of habeas corpus as to the Baldwin County murder charge. The Alabama Court of Appeals affirmed the conviction but in 1994 the Supreme Court of Alabama reversed. Later in 1994, this court granted a writ of habeas corpus for both Mobile County convictions. In 1995, Pardue was retried and convicted by a jury for one of the Mobile County murders but the Alabama Court of Criminal Appeals reversed the following year. The State of Alabama subsequently *nolle prossed* all remaining charges in 1997.

On June 25, 1999, Pardue filed this action in the Northern District of Alabama. On September 1, 1999, the action was transferred to this court. (Doc. 28). In an omnibus order on myriad motions to dismiss, Judge Vollmer eliminated all claims except for § 1983 claims and various state-law tort claims against the remaining defendants. (Doc. 126 pp. 105-113).

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[1] Unless otherwise noted all background facts are taken from Judge Vollmer's order of May 30, 2001. (Doc. 126).

Plaintiff's amended complaint notes that the "State law claims alleged [t]herein are ancillary to the Federal claims." (Doc. 52, ¶ 16).

II. SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be granted:

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

FED.R.CIV.P. 56(c). As succinctly stated by the Eleventh Circuit:

> A factual dispute is genuine only if "a reasonable jury could return a verdict for the nonmoving party." *United States v. Four Parcels of Real Property,* 941 F.2d 1428, 1437 (11th Cir.1991) (citation omitted). The moving party bears the burden of proving that no genuine issue of material fact exists. *O'Ferrell v. United States,* 253 F.3d 1257, 1265 (11th Cir.2001). In evaluating the argument of the moving party, the district court must view all evidence in the light most favorable to the non-moving party, and resolve all reasonable doubts about the facts in its favor. *Burton v. City of Belle Glade,* 178 F.3d 1175, 1187 (11th Cir.1999). Assuming the moving party has met its burden, the

> non-movant must then show a genuine dispute regarding any issue for which it will bear the burden of proof at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

Information Systems and Networks Corp. v. City of Atlanta, 281 F.3d 1220, 1224-25 (11th Cir. 2002). The purpose of summary judgment "is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Resolution Trust Corp. v. Dunmar Corp.,* 43 F.3d 587, 592 (11th Cir. 1995), *cert. denied sub nom. Jones v. Resolution Trust Corp.,* 516 U.S. 817, 116 S.Ct. 74, 133 L.Ed.2d 33 (1995).

> In opposing a motion for summary judgment, "a party may not rely on his pleadings to avoid judgment against him." *Ryan v. Int'l Union of Operating Eng'rs, Local 675,* 794 F.2d 641, 643 (11th Cir. 1986). There is no burden upon the district court to distill every potential argument that could be made based upon the materials before it on summary judgment. *Blue Cross & Blue Shield v. Weitz,* 913 F.2d 1544, 1550 (11th Cir. 1990). Rather, the onus is upon the parties to formulate arguments; grounds alleged in the complaint but not relied upon in summary judgment are deemed abandoned. *Road Sprinkler Fitters Local Union No. 669 v. Indep. Sprinkler Corp.,* 10 F.3d 1563, 1568 (11th Cir. 1994) (citing *Lazzara v. Howard A. Esser, Inc.,* 802 F.2d 260, 269 (7th Cir. 1986)),

cert. denied, ___ U.S. ___, 115 S.Ct. 189, 130 L.Ed.2d 122 (1994).

Id. at 599. The "complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The failure by the nonmoving party to make a sufficient showing on an essential element of its action entitles the moving party to judgment as a matter of law. *Id.* at 323, 106 S.Ct. at 2552.

III. ANALYSIS

A. *Heck v. Humphrey*, 512 U.S. 477 (1994).

"[A] § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated." *Heck v. Humphrey,* 512 U.S. 477, at 489-490, 129 L. Ed. 2d 383, 114 S. Ct. 2364 (1994). Under *Heck v. Humphrey,* a state prisoner may not bring a claim for damages under 42 U.S.C. § 1983 "if a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction." *Id.* at 487. Therefore, before a state prisoner may commence a § 1983 action there must be a **favorable termination** of the state conviction. *See also, Muhammad v. Close,* ___ U.S. ___, 124 S.Ct. 1303 (2004) ("In *Heck v. Humphrey* (citation omitted), we held that where success in a prisoner's § 1983 damages action would implicitly question the validity of conviction or

duration of sentence, the litigant must first achieve favorable termination of his available state, **or federal habeas**, opportunities to challenge the underlying conviction or sentence) (emphasis added).

> The original language in *Heck* is:
>
> > in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, [footnote omitted] a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, **or called into question by a federal court's issuance of a writ of habeas corpus**, 28 U.S.C. § 2254.

Id. at 485 (emphasis added).

There is no dispute but that plaintiff's conviction and imprisonment were called into question by two separate writs of habeas corpus, one in 1992 and one in 1994, which required the State of Alabama to either release or retry the plaintiff on the various state charges. Judge Vollmer addressed the statute of limitations issue regarding the § 1983 claims and the state law claims jointly and held that the statute of limitations as to both claims ran from the date the State of Alabama decided to *nolle pros* plaintiff's remaining charges. The State of Alabama *nolle prossed* the Mobile County charges in June 1997, and the Baldwin County charge in August 1997.

In support of this determination, Judge Vollmer cited two federal cases. The first, *Smith v. Holtz,* 87 F.3d 108, (3rd Cir. 1996) held that reversal of a conviction and remand for further proceedings did not constitute a favorable termination of the underlying proceedings under *Heck.* The court finds that *Smith* is not directly applicable to the instant case because it analyzes the reversal prong of *Heck,* and not the habeas prong, as discussed *infra.* The second case, *DiBlasio v. City of New York,* 102 F.3d 654 (2nd Cir. 1996), held that a writ of habeas corpus did not, by itself, satisfy the favorable termination element and is discussed at length, infra.

B. Binding precedent not directly on point

The court can find no Eleventh Circuit cases directly on point and the parties have cited none. In *Kelly v. Serna,* 87 F.3d 1235 (11th Cir. 1996), the Court applied the *Heck* rule to a *Bivens* action and clarified the definition of "reversed." In so doing, the Court held that plaintiff's claims were time-barred because his underlying convictions had been reversed outside the applicable statute of limitations. In *Uboh v. Reno,* 141 F.3d 1000 (11th Cir. 1998), the court held that "[c]onsistent with each of the policies underlying the favorable termination requirement, however, courts have found favorable termination to exist by virtue of an acquittal, an order of dismissal reflecting an affirmative decision not to prosecute, a dismissal based on the running of the statute of limitations, an entry of a nolle prosequi, and, in some cases, a

granted writ of habeas corpus." *Id.* at 1005 (emphasis added). The Court went on to note that the facts of its case met none of the aforementioned subcategories.

The court does not read these two cases as removing the "or called into question by a federal court's issuance of a writ of habeas corpus" prong of the Supreme Court's mandate in *Heck* or its recent affirmation of *Heck* in *Muhammad v. Close.* Clearly, the statute of limitations on a § 1983 claim begins to run upon the reversal of the underlying conviction by a court of competent jurisdiction, but this is not the sole trigger. The plain language of *Heck* states that there are four instances in which the § 1983 cause of action accrues, only one of which is a direct reversal. Another of those four events is when the underlying conviction is called into question by a writ of habeas corpus. *Heck* at 485.

C. Non-binding precedent not on point

Defendants Mann and City of Saraland cite *Clay v. Allen,* 242 F.3d 679 (5th Cir. 2001), in support of their argument that plaintiff's § 1983 claim is time-barred. The court finds that *Clay* is unavailing. In *Clay,* the Fifth Circuit applied a literal reading to the term "reversal" and held that the statute of limitations on a § 1983 claim begins to run upon reversal, even where there is an express mandate for a retrial. This case is unavailing for two reasons. First, *Clay v. Allen* analyzes the "reversal" prong of *Heck,* while the

instant case is concerned only with the last prong (underlying conviction "impugned by the grant of a writ of habeas corpus"). Secondly, as noted in *Clay,* the Eleventh Circuit expressly disagreed with this interpretation of the term "reversal" in *Uboh, supra.* Regardless, because the "reversal" prong is not at issue in this case, *Clay* is inapplicable.

D. Non-binding precedent directly on point

As stated, the court has found no Eleventh Circuit cases directly on point. However, the facts and procedural history of *Smith v. Gonzales,* 222 F.3d 1220 (10th Cir. 2000) are similar to the those of the instant case. The following case history is quoted from the decision:

> In 1977, the State of New Mexico tried Smith for the kidnaping and murder of two women. The trial court declared a mistrial due to the jury's inability to reach a unanimous verdict. In 1978, a second jury acquitted Smith of the kidnaping charges, but convicted him of two counts of first degree murder. The trial judge sentenced Smith to two consecutive terms of life imprisonment. On appeal, the New Mexico Supreme Court affirmed Smith's convictions.
>
> In 1983, Smith, through new counsel, filed a motion for post-conviction relief in the state trial court claiming, *inter alia,* that the prosecution had failed to disclose exculpatory evidence in violation of *Brady v. Maryland,*

373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The court denied his motion in February 1984, and Smith filed a state petition for a writ of habeas corpus in May 1984. The state trial court summarily dismissed the petition in 1987, and the New Mexico Supreme Court denied review. In 1988, Smith filed a federal petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The federal district court dismissed Smith's petition with prejudice, and Smith appealed.

On March 7, 1995, we held that the prosecution had failed to disclose several pieces of relevant material exculpatory evidence, thereby violating Smith's constitutional due process right to a fair trial. *Smith v. Secretary of N.M. Dep't of Corrections,* 50 F.3d 801, 835 (10th Cir.1995). We vacated Smith's conviction and remanded the case to the district court. *Id.* We instructed the district court on remand "to enter an order directing the State of New Mexico, within ninety (90) days of the entry of that order, to either grant Mr. Smith a new trial or, in the alternative, to order his permanent release from custody." *Id.*

The State of New Mexico granted Smith a new trial and tried him for a third time. The jury could not reach a unanimous verdict, and the trial court once again declared a mistrial. On April 21, 1996, New Mexico state prosecutors filed a *nolle prosequi* indicating that they would not prosecute Smith's

> case further. The State released Smith from prison on the same day.
>
> On February 19, 1999, Smith filed the instant suit pursuant to 42 U.S.C. § 1983, seeking compensatory and punitive damages for defendants' violations of his constitutional rights. Defendants filed a motion to dismiss under Fed.R.Civ.P. 12(b)(6), arguing that Smith's civil suit is barred by the applicable statute of limitations. The district court granted defendants' motion and dismissed the suit with prejudice. Smith filed a timely appeal.

Smith v. Gonzales, 222 F.3d 1220, 1221 (10th Cir. 2000).

The Tenth Circuit Court of Appeals went on to affirm the district court's ruling that the statute of limitations began to run on the date petitioner's underlying criminal conviction in state court was called into question by the federal court's grant of petitioner's habeas petition, and not from the date the underlying charges were eventually nolle prossed. The Court held that:

> In order to recover damages for an allegedly unconstitutional conviction, "a § 1983 plaintiff must prove that the conviction . . . has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck v. Humphrey,* 512 U.S. 477,

> 486-87, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). A plaintiff may not bring a civil rights suit if a favorable result in the suit would necessarily demonstrate the invalidity of an outstanding criminal judgment against the plaintiff. *Id.* at 487, 114 S.Ct. 2364. Thus, a § 1983 claim necessarily challenging the validity of a conviction does not arise until the conviction itself has been invalidated. *Beck,* 195 F.3d at 557. "Because the cause of action does not accrue until such time, the applicable statute of limitations does not begin to run until the same time." *Id.* (citing *Heck,* 512 U.S. at 489-90, 114 S.Ct. 2364).

Smith v. Gonzales, 222 F.3d 1220, 1222 (10th Cir. 2000). By holding that plaintiff's statute of limitations on the § 1983 claim ran from the date the underlying conviction was impugned by a writ of habeas corpus, and not the later date that the charges were nolle prossed, the Court applied the clear language of *Heck* and did not construe the *Heck* opinion in any way inconsistent with the text of the opinion.

The Fifth Circuit has also adopted a literal read of *Heck*'s "invalidation" language. *Hulsey v. Owens,* 63 F.3d 354 (5th Cir. 1995). Therein the court said

> *Heck v. Humphrey* prevents an action for damages under 42 U.S.C. § 1983 when the complaint, directly or indirectly, challenges the legality of the complainant's conviction or imprisonment. A § 1983 plaintiff must first prove that his conviction or sentence has been invalidated in a proper proceeding prior

> to bringing a § 1983 action. If the sentence or conviction has not been invalidated there can be no action for damages under § 1983, and the statute of limitations has not begun to run. Consequently, the statute of limitations on [plaintiff]'s § 1983 claim will not begin to run until *after* he has obtained habeas relief, if warranted.

Id. at 355 n. 2 (citation omitted) (emphasis in original).

Another case similar to the case *sub judice* is *Diblasio v. City of New York,* 1996 WL 38826 (SDNY 1996), where the court set forth the case history as follows:

> Plaintiff, a physician, was convicted in 1986 of selling cocaine. After plaintiff filed a petition in the Eastern District of New York, a writ of habeas corpus was granted. On May 9, 1991, the Second Circuit affirmed this decision. *DiBlasio v. Keane,* 932 F.2d 1038 (2d Cir. 1991). The Court found that plaintiff's due process rights had been violated when the trial court denied his request to compel the prosecution to disclose the identity of an informant, who was crucial to establishing plaintiff's entrapment defense. *Id.* at 1043. Plaintiff's subsequent retrial ended in a judgment of acquittal on January 30, 1992.
>
> On January 23, 1995, plaintiff commenced this action pursuant to 42 U.S.C. § 1983. Plaintiff's complaint alleges that the City of New York violated his civil rights by

> failing to train the police not to engage in entrapment and by failing to train prosecutors to produce confidential informants who have information essential to a defendant's claim of entrapment. The defendants have moved to dismiss the complaint on the ground that the action is time-barred because the applicable three year statute of limitations began to run on May 9, 1991 – the date the Second Circuit affirmed the grant of the writ of habeas corpus.

Id. at *1.

The district court in *DiBlasio* unequivocally found that the statute of limitations on the plaintiff's § 1983 claim began to run, "at the latest, when the Second Circuit affirmed the grant of habeas corpus." As in the instant case, the court noted that no case had been provided to support a departure from the clear language of *Heck*. Furthermore, the court noted

> there is no logical reason to draw the distinction urged by plaintiff. Here, the unconstitutional conduct of which plaintiff complains . . . subjected plaintiff to an unconstitutional first trial. Whether or not plaintiff prevailed on the factual issue of entrapment at his retrial did not change the fact that his constitutional rights were violated at the first trial. The unconstitutional nature of defendants' actions was established, at the latest, when the Second Circuit affirmed the grant of habeas corpus.

Id.

The Second Circuit Court of Appeals affirmed *DiBlasio* on other grounds, but disagreed in *dicta* with the district court's findings regarding the beginning of the statute of limitations on the plaintiff's § 1983 claim. *DiBlasio v. City of New York,* 102 F.3d 654 (2nd Cir. 1996). As mentioned above, this is one of the two cases cited in Judge Vollmer's decision regarding the time at which the statute of limitations on the § 1983 claim began to run. Therein, the *DiBlasio,* Court held that the rule of *Heck* was, in essence, adopting the New York line of cases that require a "final disposition" defined as a finding that "indicate[s] the accused is not guilty." *DiBlasio* at 658 quoting *Singleton v. City of New York,* 632 F. 2d. 185 at 193 (2nd Cir. N.Y.1980). After determining that the Supreme Court in *Heck* was adopting the "final determination" rule of the New York courts, the *DiBlasio* Court held that the now oft-repeated phrase that a § 1983 cause of action did not accrue until "the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus" could not be taken literally. The Court held that:

> If interpreted literally, this sentence would seem to mean that any time a conviction is overturned by a writ of habeas corpus there has been a final determination in favor of the accused. We are not convinced that this is what the *Humphrey* Court intended.

DiBlasio at 658.

This court disagrees with the *DiBlasio* Court's reading of *Heck,* insofar as it imposed a "final determination" requirement not present contained in the *Heck* opinion. The *Heck* Court held that a "cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has **been invalidated**." *Heck* at 490 (emphasis added). This court finds that equating *Heck*'s "invalidation" requirement with the more stringent standard of a "final determination in favor of the accused" is not appropriate given the clear language of *Heck.*

This court finds that the Supreme Court meant what it said in defining *Heck*'s invalidation requirement with, *inter alia,* the phrase "or impugned by a writ of habeas corpus." *Heck* at 487, 489. Without any additional evidence that the Supreme Court intended to adopt the New York rule, or that the clear language of *Heck* resulted in an inadvertent result not intended by the Supreme Court's majority, this court is obligated to adhere to the *Heck* decision as written, and as followed in the Tenth Circuit's holding in *Smith v. Gonzales,* 222 F.3d 1220, 1221 (10th Cir. 2000), the Fifth Circuit's language in *Hulsey v. Owens,* 63 F.3d 354 (5th Cir. 1995) and the district court's holding in *Diblasio v. City of New York,* 1996 WL 38826 (SDNY 1996).

E. Applicable statute of limitations

All parties agree that the applicable statute of limitations on the remaining claims is two years. Plaintiff filed the instant suit well after two years from the date of either of the grants of habeas corpus that impugned his underlying convictions, issued in 1992 and 1994. Therefore the court finds that this action, filed in 1999, was filed well after the statute of limitations on plaintiff's § 1983 claims expired. Therefore the court finds that summary judgment as to all of plaintiff's § 1983 claims is due to be and hereby is **GRANTED**. All remaining state law claims are ancillary to the § 1983 claims. The court declines to exercise pendent jurisdiction over these claims and therefore all remaining claims are due to be and hereby are **DISMISSED without prejudice**[2]

CONCLUSION

The court finds that plaintiff's § 1983 claims were not timely filed as they were not filed within two years from the date plaintiff's underlying convictions were called into question by the applicable writs of habeas corpus. Therefore summary judgment as to all § 1983 claims is due to be and hereby is **GRANTED**. In light of the foregoing, all pending motions to strike are **MOOT**. The court declines to exercise pendent

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[2] The tolling provisions 28 U.S.C. § 1367(d) are applicable to the remaining claims, which plaintiff may pursue in state court. *See, Jinks v. Richland County, S.C.*, 538 U.S. 456 (2003).

jurisdiction over the remaining state law claims and therefore these claims are due to be and hereby are **DISMISSED WITHOUT PREJUDICE**.

DONE and ORDERED this 11th day of August, 2004.

/s/ Callie V. S. Granade
CHIEF UNITED STATES
DISTRICT JUDGE

APPENDIX C

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

MICHAEL PARDUE,

Plaintiff

v.

CIVIL ACTION 1:99-0799-RV-M

**MOBILE COUNTY, ALABAMA,
BALDWIN COUNTY, ALABAMA,
CITY OF SARALAND, ALABAMA,
FRANK MANN,
A.D. "COTTON" LONG,
WILLIS HOLLOWAY,
CHARLIE GRADDICK,
TOM HARRISON,
MARION SENNETT,
CHANDLER K. STANARD,
MIKE DAVIS,
ED LEMLIER,
JIM HENDRIX,
J. DAVID WHETSTONE,
and JUDY A. NEWCOMB,**

Defendants

ORDER

I. INTRODUCTION/PROCEDURAL BACKGROUND

This civil rights action constitutes yet another chapter in the long-running saga of plaintiff Michael

Pardue's extensive contacts with the state and federal courts in Alabama.[1] In 1973, a jury convicted Pardue of murder in Baldwin County, Alabama. Soon thereafter, Pardue pleaded guilty to two other murders in Mobile County, Alabama. In 1994, all three convictions were overturned; the Supreme Court of Alabama reversed the Baldwin County conviction, and a federal judge in this district issued a writ of habeas corpus for both Mobile County convictions. Pardue was retried and convicted by a jury for one of the Mobile County murders in 1995, but the Alabama Court of Criminal Appeals reversed the following year. The State of Alabama subsequently *nolle prossed* all three murder charges.

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[1] *See, e.g., Ex parte Pardue*, No. 1980254, 2000 WL 264257 (Ala. Mar. 10, 2000), *reh'g overruled*, 2000 WL 573110 (Ala. May 12, 2000), *rev'g sub nom. Pardue v. Alabama*, 741 So. 2d 485 (Ala. Crim. App. Aug. 14, 1998); *Ex Parte Pardue*, 661 So. 2d 268 (Ala. 1994), *rev'g sub nom. Pardue v. Alabama*, 661 So. 2d 263 (Ala. Crim. App. 1993); *Pardue v. Alabama*, 571 So. 2d 333 (Ala. 1990), *rev'g* 571 So. 2d 320 (Ala. Crim. App. 1989); *Pardue v. Alabama*, No. CR-97-0551, 1998 WL 881164 (Ala. Crim. App. Dec. 18, 1998); *Pardue v. Alabama*, 695 So. 2d 199 (Ala. Crim. App. 1996); *Pardue v. Alabama*, 584 So. 2d 888 (Ala. Crim. App. 1991); *Pardue v. Alabama*, 571 So. 2d 335 (Ala. Crim. App. 1990); *Pardue v. Alabama*, 566 So. 2d 502 (Ala. Crim. App. 1990); *see also Pardue v. Burton*, 26 F.3d 1093 (11th Cir. 1994).

On June 25, 1999, Pardue filed this civil action.[2] In his first Amended Complaint, (doc. 52),[3] Pardue

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[2] Pardue originally filed this action in the Northern District of Alabama. Deputy A. D. Long, one of the defendants who moved to change venue, argued that a transfer to the Southern District pursuant to 28 U.S.C. § 1404(a) would serve both the interests of justice and the convenience of the parties (doc. 16). Although the court purported to rely upon the reasoning in Long's motion, the language in the transfer order suggests that the transfer was based on improper venue under 28 U.S.C. § 1406(a) rather than an inconvenient forum under section 1404(a):

> The fact that venue is proper in the United States District Court for the Southern District of Alabama, and is not proper in this court, is so obvious that findings of fact and conclusions of law as a basis for transferring the case to the Southern District of Alabama would be a waste of judicial time. How plaintiff arrived at the conclusion that he can sue a bunch of South Alabamians in North Alabama is anybody's guess! The alternative motion of defendant, A.D. "Cotton" Long, to transfer, is well taken and is hereby GRANTED.

August 27, 1999 Order (doc. 27) (Acker, J.).

[3] Prior to the transfer, Pardue sought leave to file an amended complaint, (doc. 21); that motion was still pending when the action was transferred to this district. On October 26, 1999, the undersigned held a hearing on Pardue's motion to amend and on defendants' pending motions to dismiss. As a result of that hearing, the court denied Pardue's motion to file the proposed amended complaint due to the deficiencies therein, but granted him leave to file an amended complaint which addressed the issues identified during the hearing. (doc. 49). The court also denied defendants' motions to dismiss without prejudice, specifically giving them the right to file new motions to dismiss if such were warranted by the new pleading.

(Continued on following page)

asserts numerous claims under 42 U.S.C. § 1983 and state tort law against three local governments and twelve individuals, alleging that they conspired and/or acted under the color of state law to violate his rights protected by the Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution and/or are liable under state law for conspiracy, malicious prosecution, outrage, wantonness, libel, and slander.[4]

By motion, every defendant except Ed Lemlier seeks a partial or total dismissal of the claims asserted against the movants.[5] After carefully reviewing the law and considering the submissions of the

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Pardue filed an amended complaint on November 9, 1999, (doc. 52), and it is that complaint – essentially Pardue's third attempt to plead his case adequately – to which the court looks in addressing defendants' new motions to dismiss (*see* note 4) in this order.

[4] *See also* note 22.

[5] *See* "Mobile County's Renewed Motion to Dismiss" and supporting brief (docs. 55, 56); the "Renewed Motion to Dismiss of Defendant Sennett" (doc. 59); the "Renewed Motion to Dismiss of Defendants Davis and Harrison" (doc. 60); Stanard's "Motion to Dismiss Amended Complaint" and supporting brief (docs. 62, 63); the "Renewed Motions by Defendants Baldwin County and A. D. Long to Dismiss" and supporting brief (docs. 64, 65); the "Renewed Motion to Dismiss and Motion for More Definite Statement of Graddick" (doc. 67); the "Motion to Dismiss of Defendant Holloway" (doc. 68); "City of Saraland and Frank Mann's Renewed Motion to Dismiss" and supporting brief (docs. 70, 71); the "Motion to Dismiss of Defendants Whetstone and Newcomb" (doc. 86); "Motion to Dismiss or Motion for More Definite Statement of Defendant Hendrix" (doc. 87).

parties,[6] the court concludes that the dismissal motions filed by Baldwin County, A. D. "Cotton" Long, Chandler K. Stanard, Tom Harrison, Mike Davis, J. Davis Whetstone, and Judy A. Newcomb are due to be granted in *toto*; that the dismissal motions filed by Mobile County, Charlie Graddick, and Jim Hendrix are due to be granted in part and are moot in part; that the dismissal motions filed by Willis Holloway and Marion Sennett are due to be granted in part and denied in part; that the dismissal motion filed by Frank Mann is due to be denied; and that the dismissal motion filed by the City of Saraland is moot.

II. MOTION TO DISMISS STANDARDS

Motions to dismiss are governed by Federal Rule of Civil Procedure 12. Defendants' motions implicate Rules 12(b)(1) (subject matter jurisdiction) and 12(b)(6) (Failure to state a claim upon which relief can be granted).

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[6] In addition to the submissions identified in note 5, *supra*, the court has considered Pardue's responses to the motions filed by Mobile County (doc. 72); Davis and Harrison (doc. 78); Graddick (doc. 79); Stanard (doc. 80); City of Saraland and Mann (doc. 81); Long and Baldwin County (doc. 82); Holloway (doc. 83); Sennett (doc. 84); Whetstone and Newcomb (doc. 97); and Hendrix (doc. 102).

The court has also considered the replies of Mobile County (doc. 76); Graddick (doc. 90); Harrison and Davis (doc. 91); Sennett (doc. 94); Holloway (doc. 96); Long and Baldwin County (doc. 98); Whetstone and Newcomb (doc. 100); and Hendrix (doc. 103).

A. Federal Rule of Civil Procedure 12(b)(6)

A court may dismiss a complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure only if it is clear that no relief could be granted under any set of facts which could be proven to be consistent with the allegations contained within the pleading. *See Mesocap Indus. Ltd. v. Torm Lines*, 194 F.3d 1342, 1343 (11th Cir. 1999). In evaluating a motion to dismiss, the court must accept as true all well-pleaded factual allegations and view them in the light most favorable to the nonmoving party. *See Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1273 n.1 (11th Cir. 1999).

B. Federal Rule of Civil Procedure 12(b)(1)

In contrast to the Rule 12(b)(6) standard, the Rule 12(b)(1) standard requires the court to resolve factual disputes relative to subject matter jurisdiction. *Scarfo v. Ginsberg*, 175 F.3d 957, 961 (11th Cir. 1999), *cert. denied*, 120 S.Ct. 1267 (2000).

C. Heightened Pleading Standard

In determining whether a plaintiff has stated a claim under 42 U.S.C. § 1983 against a government official in an individual capacity, the court is "guided both by the regular [Rule] 12(b)(6) standard and by the heightened pleading requirement." *GJR*

Investments, Inc. v. County of Escambia, 132 F.3d 1359, 1367 (11th Cir. 1998).

> [W]hile Fed.R.Civ.P. 8 allows a plaintiff considerable leeway in framing its complaint, this Circuit, along with others, has tightened the application of Rule 8 with respect to § 1983 cases in an effort to weed out non-meritorious claims, requiring that a § 1983 plaintiff allege with some specificity the facts which make out its claim. *See Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1485 (11th Cir. 1992) (citing *Arnold v. Bd. of Educ.*, 880 F.2d 305, 309 (11th Cir. 1989)). Some factual detail in the pleadings is necessary to the adjudication of § 1983 claims.

GJR Investments, 132 F.3d at 1367. The purpose of the heightened pleading requirement is to allow the court to determine whether an individual defendant's actions violated a clearly established constitutional right or whether the individual defendant is entitled to qualified immunity. *Id.* Accord, *Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1485 (11th Cir. 1992).[7]

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[7] Although the Court of Appeals for the Eleventh Circuit has made clear that the "heightened pleading standard" applies in section 1983 cases against a government official acting in his individual capacity, *see GJR Investments, Inc. v. County of Escambia*, 132 F.3d 1359, 1368 (11th Cir. 1998), it is equally clear that the standard does not apply to section 1983 claims against municipalities. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 166-67, 113 S. Ct. 1160, 1162-63, 122 L. Ed. 2d (1993).

III. THE DEFENDANTS

Defendant Mobile County is a political subdivision of the State of Alabama. Several members of the Mobile County Sheriff's Department and the Mobile County District Attorney's Office interrogated, investigated, prosecuted, and/or re-prosecuted Pardue in 1973 and 1995 for the Mobile County murders.

Defendant Baldwin County is a political subdivision of the State of Alabama. Some members of the Baldwin County Sheriff's Department and the Baldwin County District Attorney's Office interrogated, investigated and/or prosecuted Pardue in 1973 for the Baldwin County murder.

Defendant City of Saraland is a municipal corporation within Mobile County. Various officers with the Saraland Police Department interrogated and investigated Pardue in 1973 for the Mobile County murders.

Defendant Frank Mann is a former police officer with the Saraland Police Department. Officer Mann interrogated and investigated Pardue in 1973 for the Mobile County murders.

Defendant A. D. "Cotton" Long is a former Baldwin County Deputy Sheriff.[8] Deputy Long investigated Pardue in 1973 for the Baldwin County murder.

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[8] The amended complaint states that Long "was employed as an investigator for Baldwin County in 1973," Am. Compl.

(Continued on following page)

Defendant Willis Holloway is a former assistant district attorney for Mobile County. Asst. Dist. Atty. Holloway investigated and prosecuted Pardue in 1973 for the Mobile County murders, and he was involved in the 1995 re-prosecution of Pardue for one of those murders.

Defendant Charlie Graddick is a former assistant district attorney for Mobile County. Asst. Dist. Atty. Graddick took part in Pardue's 1973 prosecution for the Mobile County murders, and he also allegedly made defamatory statements about Pardue in 1997.

Defendant Tom Harrison is an assistant district attorney for Mobile County. Asst. Dist. Atty. Harrison lead the re-prosecution of Pardue in 1995 for one of the Mobile County murders.

Defendant Marion Sennett is a former forensics specialist with the Alabama Department of Toxicology and Criminal Investigation,[9] which is now known as

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(doc. 52 ¶ 5), but Long asserts in his brief in support of dismissal that he was actually a Baldwin County Deputy Sheriff. *See* Br. in Support of Renewed Motions by Baldwin County and A. D. Long to Dismiss (doc. 65 at 3). Because Pardue does not dispute Long's assertion and, indeed, referred to him as "Deputy Long" in his response to Long's motion to dismiss, *see* Pl.'s Resp. to Defs. Baldwin County and A. D. Long's Mot. to Dismiss (doc. 82 at 5), the court identifies Long as a deputy sheriff.

[9] Though the amended complaint alleges that Sennett was "employed by Mobile County as [a] Forensics Specialist," Am. Compl. (doc. 52 ¶ 58), Mobile County suggests that Sennett was an employee of the State rather than the County, and it points to Pardue's allegation that Sennett was an assistant to Nelson

(Continued on following page)

the Alabama Department of Forensic Sciences. Forensic Specialist Sennett participated in the 1973 investigation of the Mobile County murders.

Defendant Chandler K. Stanard represented Pardue in the 1973 Mobile County and Baldwin County murder prosecutions.

Defendant Mike Davis is a former assistant district attorney for Mobile County. Asst. Dist. Atty. Davis participated in the 1995 re-prosecution of Pardue for one of the Mobile County murders.

Defendant Ed Lemlier is a former investigator for the Mobile County Sheriff's Department. Investigator Lemlier participated in the 1995 investigation of Pardue for one of the Mobile County murders.

Defendant Jim Hendrix is a former district attorney for Baldwin County. Dist. Atty. Hendrix prosecuted Pardue in 1973 for the Baldwin County murder.

Defendant J. David Whetstone is the District Attorney for Baldwin County. Dist. Atty. Whetstone allegedly made defamatory statements about Pardue in 1997.

Grubbs, a State Toxicologist. *See* Mobile County's Br. in Supp. of Renewed Mot. to Dismiss (doc. 56 at 6 n.3) (citing Am. Compl. (doc. 52 ¶¶ 35, 58)). Because Pardue does not contest this assertion in his response to Mobile County's motion to dismiss, *see* Pl.'s Resp. to Def. Mobile County's Mot. to Dismiss (doc. 72), the court refers to Sennett as a state forensics specialist.

Defendant Judy A. Newcomb is the Chief Assistant District Attorney for Baldwin County. Chief Asst. Dist. Atty. Newcomb allegedly made defamatory statements about Pardue in 1998.

IV. FACTUAL BACKGROUND[10]

At approximately 2:00 a.m. on May 22, 1973, the body of service station attendant Ronald Rider was discovered at the Thoni Service Station in Baldwin County (doc. 52 ¶ 20). Rider had been struck in the head with a crowbar and killed by a shotgun wound, apparently during the course of a robbery (*id.* at ¶ 22). Approximately four hours later, a motorist found the body of Will Harvey Hodges at the Double A Service Station in neighboring Mobile County (*id.* at ¶ 20). A crime scene report indicated that two shots had been fired and that "there had to be two people present at the incident when Hodges was shot" (*id.* at ¶ 23).

That same morning, seventeen-year-old Pardue arrived at his grandmother's house and learned that

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[10] As the court is required to do when addressing a motion to dismiss, the court construes the "facts" set forth in the amended complaint in a light most favorable to Pardue as the non-moving party. However, the court stresses that the "facts" set out in this order are simply a condensed version of Pardue's allegations in his amended complaint. As such, these "facts" do not represent findings of fact by the court and may turn out not to be the actual facts of this case should the case proceed to trial. *Hudson v. Hall*, 231 F.3d 1289, 1292 n.2 (11th Cir. 2000).

the Saraland police wanted to talk to him (*id.* at ¶ 26). Pardue claims that, during the night before, he had stolen a truck and several tires from a mechanic's garage in the City of Saraland and driven around with an acquaintance, Teresa Lanier, until the truck became disabled (*id.* at ¶¶ 24, 25). Pardue then allegedly walked to the Scott Paper Company parking lot, stole a Volkswagen, and returned with Lanier to the Plantation Inn Motel where another acquaintance, John Brown, was staying (*id.* at ¶ 25). Pardue claims that he slept in Brown's station wagon at the motel and returned to his grandmother's house that next morning (*id.* at ¶¶ 25, 26).

Assuming that the police wanted to discuss the stolen vehicles, Pardue went to the Saraland Police Department (*id.* at ¶ 26). After waiting at the station for about an hour, Pardue was taken into a storage room and seated by a desk (*id.*). Pardue alleges that sometime thereafter Mobile County Chief Deputy Sheriff William Travis[11] and Mobile County Deputy Sheriffs "Cookie" Estes and Albert Strohe[12] burst into

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[11] Although the amended complaint initially identifies Travis as the "Chief Detective for Mobile County Sheriff's Department," Am. Compl. (doc. 52 ¶ 27), Travis is later identified as the "Mobile County Chief Deputy." *Id.* at 82. Given that the latter description is arguably more specific, the court uses that title here.

[12] Pardue fails to identify Estes and Strohe in the amended complaint as deputy sheriffs or any other type of law enforcement officer. Pardue does allege that Estes and Strohe were hired by the "Mobile County Personnel Board," Am. Compl. (doc. 52 ¶ 30), and that they were employed by the "Mobile County

(Continued on following page)

the room, threw the door against the wall, and said "You're a vicious little son of a bitch and an animal. What the fuck did you blow their heads off for? They can't see their families again because you shot their heads off" (*id.* at ¶¶ 27, 28). Pardue became scared, quiet, and subdued (*id.* at ¶ 28). Despite their accusatory tone, the deputies had no evidence that Pardue had committed any of the murders when they began the interrogation (*id.* at ¶ 30). Nonetheless, Pardue claims that Estes and Strohe began to bicker about how to "eliminate" Pardue and "give him what he deserved" while Travis, who reportedly had a notorious history of beating and intimidating suspects in order to obtain confessions, told Pardue: "We know you did it and you are going to tell us all about it" (*id.* at ¶¶ 28, 46).

Pardue was then subjected to a seventy-eight hour interrogation by Travis, Estes and Strohe, as well as Saraland Police Chief Frank Pridgen and Saraland Police Officers Frank Mann, Jack Creekmore and W.C. Squires (*id.* at ¶¶ 29, 44).[13] Mobile County Asst. Dist. Atty. Willis Holloway was also present (*id.* at ¶ 55). Over the course of the interrogation, Pardue was beaten, starved, tortured, subjected

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Sheriff's Department," *id.* at ¶ 43. The court will identify them as "deputy sheriffs" for ease of reference.

[13] Of these seven law enforcement officers, Pardue actually named only one – Officer Mann – as a defendant in this action, even though Pardue specifically discusses each officer's conduct in the amended complaint.

to emotional abuse, deprived of sleep, and denied the ability to call his family (*id.* at ¶ 29). Although two attorneys tried to speak with Pardue during his interrogation, both were turned away by the police (*id.*). On the third day of his interrogation, Pardue not only confessed to killing Ronald Rider (the Baldwin county murder) and Will Harvey Hodges (one of the Mobile County murders), but he confessed to killing Theodore White also (the second Mobile county murder), whose skeletal remains were found in a rural area of Mobile County during the interrogation (*id.*). Pardue alleges that he was then forced to repeat his confession over and over again until the details conformed to the story articulated by Chief Deputy Travis (*id.* at ¶¶ 53, 54). When Pardue appeared at a preliminary hearing several days later, he suffered from bruising, swelling and near complete exhaustion (*id.* at ¶ 48).

During Pardue's interrogation, he told police about a shotgun that was at the home of a friend, J. B. Duncan (*id.* at ¶ 53). Although Chief Deputy Travis, Chief Pridgen, Asst. Dist. Atty. Holloway, and Officers Mann and Creekmore later found a shotgun during a search of Duncan's home, Pardue asserts that the shotgun was dusty and covered with cobwebs (*id.* at ¶ 32). Chief Deputy Travis told Duncan that the shotgun was not what they were looking for, but that he had to confiscate it due to the illegal length of its barrel (*id.* at ¶ 53). Pardue claims that Pridgen, Holloway, Mann, and Creekmore then cleaned and oiled the shotgun with red rags and that Travis and

Mann planted the rags in John Brown's station wagon only to "find" them on a later search after original searches had produced no evidence (*id.* at ¶¶ 32, 53). Once the rags were "discovered," the shotgun was alleged to be the weapon that killed Ronald Rider and Will Harvey Hodges, and, possibly, even Theodore White (*id.* at ¶ 32).

Alabama State Forensics Specialist Marion Sennett was present at the first and second search of John Brown's car, and he witnessed the "discovery" of the rags (*id.* at ¶ 58). Pardue claims that Forensics Spec. Sennett also knew that his supervisor, State Toxicologist Nelson Grubbs, was ignoring the physical evidence and preparing official reports that contained false information to support Chief Deputy Travis' evidentiary needs (*id.*).[14] Sennett never protested Grubbs' conduct (*id.*). Similarly, Baldwin County Deputy Sheriff A. D. "Cotton" Long, who was one of the first law enforcement officers to arrive at the Rider murder scene, "stood silent" despite allegedly knowing that other officers were, according to Pardue, producing false records and perjured testimony to falsely convict Pardue (*id.* at ¶ 62). In addition, Pardue claims that Deputy Sheriff Long helped Chief Deputy Travis conceal all reports produced by the state troopers and by the Mobile City police officers who were present at the Rider murder scene, and he

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[14] Pardue did not name Toxicologist Grubbs as a defendant in this case.

withheld the identity of the owner of the crowbar found next to Rider's body (*id.* at ¶ 62).

On May 27, 1973, Chandler Stanard was appointed to represent Pardue (*id.* at ¶¶ 34, 49). Defense attorney Stanard waived Pardue's preliminary hearing and did not ask Pardue his version of events (*id.* at ¶ 48). Pardue asserts that when he professed his innocence, defense attorney Stanard laughed and told Pardue that it did not matter because he had confessed and there was nothing Stanard could do at this point (*id.* at ¶ 49). From the date of his appointment until Pardue's first trial, Stanard did not investigate any defense, interview any witnesses, make any pre-trial discovery motions or have any co-defendant statements produced (*id.* at ¶ 49).[15]

On August 14, 1973, less than ninety days after his arrest, Pardue was tried in Baldwin County for the murder of Ronald Rider (*id.* at ¶ 34). The entire capital murder trial lasted less than two hours (*id.*). Defense attorney Stanard failed to adequately cross-examine the state's witnesses, did not object to the admission of the shotgun found at Duncan's home and did not call necessary witnesses in Pardue's defense (*id.* at ¶¶ 35, 49, 50). Pardue also alleges that Baldwin County Dist. Atty. Jim Hendrix concealed exculpatory evidence, allowed witnesses to give perjured testimony and did not offer sufficient evidence to prove Pardue's

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[15] Pardue did not identify these co-defendants or the nature of their crimes in the amended complaint.

guilt (*id.* at ¶ 49). Nonetheless, after a short deliberation, Pardue was found guilty of murder and sentenced to life in prison (*id.* at ¶ 34).

On October 24, 1973, the day Pardue was scheduled to go to trial for the murders of Will Harvey Hodges and Theodore White in Mobile County Circuit Court, Pardue claims that Asst. Dist. Atty. Holloway and fellow Mobile County Asst. Dist. Atty. Charlie Graddick threatened to send Pardue to the electric chair if he did not plead guilty to both murders, even though the constitutionality of capital punishment was in question in 1973 (*id.* at ¶¶ 46, 57).[16] According

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[16] In 1972, the Supreme Court held that the imposition of the death penalty in the three particular consolidated cases before the Court would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution. *See Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972). Although four Justices concluded that capital punishment was not *per se* unconstitutional, *see id.* at 375, 92 S. Ct. at 2796 (Burger, C. J., dissenting); *id.* at 405, 92 S. Ct. at 2812 (Blackmun, J., dissenting); *id.* at 414, 92 S. Ct. at 2816 (Powell, J., dissenting); *id.* at 465, 92 S. Ct., at 2842 (Rehnquist, J., dissenting), the two Justices who reached a contrary conclusion, *see id.* at 257, 92 S. Ct. at 2736 (Brennan, J., concurring); *id.* at 314, 92 S. Ct. at 2765 (Marshall, J., concurring), were joined by three Justices who agreed that the particular death penalty statutes in question were unconstitutional as applied, *see id.* at 240, 92 S. Ct. at 2727 (Douglas, J., concurring); *id.* at 306, 92 S. Ct. at 2760 (Stewart, J., concurring); *id.* at 310, 92 S. Ct. at 2763 (White, J., concurring). Three years after Pardue's 1973 convictions, the Supreme Court rejected the argument that the death penalty is unconstitutional in all circumstances. *See Gregg v. Georgia*, 428 U.S. 153, 169, 96 S. Ct. 2909, 2923, 49 L. Ed. 2d 859 (1976).

to Pardue, defense attorney Stanard said nothing to refute Pardue's belief that if he did not enter a guilty plea, he would be convicted and sentenced to death by electrocution (*id.* at ¶¶ 46, 50). As a result of these statements, Pardue pleaded guilty to both murders (*id.* at ¶ 46). On his way out of the courthouse, defense attorney Stanard applied for his court appointment fees and withdrew Pardue's appeal in the Baldwin County murder case (*id.* at ¶ 50). Stanard did not seek Pardue's permission to do so, and he never informed Pardue that the appeal had been withdrawn (*id.*).

On November 18, 1992, another federal judge in this district issued a writ of habeas corpus concerning the Baldwin County murder conviction and ordered the State of Alabama to either grant Pardue an out-of-time appeal or release him from custody. The State opted to let Pardue bring an untimely appeal (*id.* at ¶ 36). Although the Alabama Court of Criminal Appeals affirmed Pardue's conviction in 1993, *see Pardue v. Alabama,* 661 So. 2d 263 (Ala. Cr. App. 1993), the Supreme Court of Alabama reversed in 1994 on the ground that the trial court improperly admitted Pardue's confession into evidence, *see Ex parte Pardue*, 661 So. 2d 268 (Ala. 1994). Later that same year, pursuant to a second federal writ of habeas corpus, the State of Alabama was ordered to either retry Pardue for the Mobile County murders or release him from custody (doc. 52 ¶ 38).

In 1995, the State re-indicted Pardue for the Mobile County murder of Will Harvey Hodges. Mobile

County Asst. Dist. Attys. Tom Harrison and Mike Davis were assigned to prosecute the case (*id.* at ¶ 59). Thereafter, Mobile County Sheriff's Dept. Investigator Ed Lemlier allegedly helped Harrison and Davis procure perjured testimony and obtain evidence that was previously thought to be unavailable (*id.* at ¶¶ 39, 61, 64).[17] Lemlier, Davis and Harrison also produced never-before seen witnesses who testified solely as to facts revealed in a newly-discovered tape-recording of Pardue's 1973 confession (*id.* at 39). The recording had been altered so that it inaccurately portrayed Pardue's interrogation to the jury during Pardue's 1995 trial (*id.* at ¶ 55).[18] In addition, Asst. Dist. Atty. Holloway and Officer Squires allegedly gave perjured testimony at Pardue's 1995 trial (*id.* at ¶¶ 43, 55, 66).

The jury found Pardue guilty of murdering Hodges (*id.* at ¶ 40), but the Alabama Court of Criminal Appeals reversed the conviction in 1996, holding

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[17] In late 1994, Pardue was given leave to conduct discovery regarding his federal habeas proceeding. *See Pardue v. Burton*, No. 90-0734-AH (S.D. Ala. Oct. 17, 1994) (doc. 41). Shortly thereafter, in response to a discovery subpoena, the records custodian of the Saraland Police Department stated in a letter that he was unable to locate any paperwork or records relating to Pardue. After Pardue was granted habeas relief, however, the Saraland Police Department found the subpoenaed documents and gave them to the Mobile County District Attorney's Office for the purpose of retrying Pardue. *See Pardue v. Burton*, No. 90-0734-AH (S.D. Ala. May 21, 1995) (doc. 60).

[18] Pardue does not allege that Lemlier, Harrison, or Davis themselves actually altered the recording.

that it was improper to admit Pardue's tape-recorded confession into evidence. *See Pardue v. Alabama,* 695 So. 2d 199 (Ala. Crim. App. 1996). The state supreme court denied *certiorari,* and the State subsequently *nolle prossed* all three murder indictments (doc. 52 ¶ 41).

In 1997, after the charges against Pardue were dismissed, former Asst. Dist. Atty. Graddick told the news media in 1997 that Pardue was a "killer who enjoyed it" (*id.* at ¶ 46). Similarly, during a February 1998 national broadcast of the "Leeza Show," Baldwin County Dist. Atty. J. David Whetstone compared Pardue to Ted Bundy and Charles Manson (*id.* at ¶ 67). Whetstone also called Pardue a "triple killer" on "Dateline NBC" and other television shows, and he gave a confidential probation report to a French news magazine (*id.*). Finally, Baldwin County Chief Asst. Dist. Atty. Judy A. Newcomb accused Pardue of being a murderer who used technicalities to have his murder convictions *nolle prossed* on Fox Network's "Catherine Crier Show" (*id.* at ¶ 68).

V. DISCUSSION

Before turning to the merits of the motions to dismiss, the court notes that its analysis of this case has been hampered by the litany of broad, conclusory, and often inconsistent allegations in Pardue's amended complaint. As a result, the court has been forced to devote a significant amount of time simply to engage in "the cumbersome task of sifting through

myriad claims, many of which are foreclosed by governmental immunities, [failure to state a claim,] and similar defenses." *Fullman v. Graddick*, 739 F.2d 553, 557 (11th Cir. 1984).

A. Official Capacity vs. Individual Capacity

The vague and presumptive nature of Pardue's amended complaint is compounded by the fact that he does not identify the capacity in which he is suing the individual defendants.[19] The court has therefore examined the arguments and defenses presented by the parties to determine whether those defendants have been sued in their official and/or individual capacities. *See Kentucky v. Graham,* 473 U.S. 159, 167 n.14, 105 S. Ct. 3099, 3106 n.14, 87 L. Ed. 2d 114 (1985) ("In many cases, the complaint will not clearly specify whether officials are sued personally, in their official capacity, or both. 'The course of proceedings' in such cases typically will indicate the nature of the liability sought to be imposed."). After reviewing the course of proceedings, the court concludes, for two reasons, that the individual defendants have been sued solely in their individual capacities. First, the parties have litigated the defense of qualified immunity, which "is available only in a personal capacity

[19] Because this case is not Pardue's counsel's first dip into § 1983 waters, it is difficult for the court to understand how counsel could have ignored such a fundament and critical element of pleading as to the twelve individual defendants.

lawsuit, not in an official capacity action." *Lundgren v. McDaniel,* 814 F.2d 600, 604 (11th Cir. 1987).[20] Second, Pardue advances no any official capacity allegations in his amended complaint or arguments in his responses to the various motions to dismiss. *See Fitzgerald v. McDaniel*, 833 F.2d 1516, 1520 (11th Cir. 1987) (considering complaint's failure to state whether defendants were sued in their official capacity in determining that plaintiff's civil rights action would be treated as naming defendants solely in their individual capacity).

Having determined that Pardue sues the individual defendants in their individual capacities only, the court turns to address Pardue's claims.

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[20] Moreover, the fact that Pardue seeks several liability against all defendants supports the view that the defendants are being sued in their individual capacity. As the Eleventh Circuit has explained, it is inconsistent to assert several liability without presenting an individual capacity claim. *See Hobbs v. Roberts,* 999 F.2d 1526, 1531 (11th Cir. 1993) ("To assert 'several' liability between a government defendant and [its employees] sued in only their official capacities seems useless; in a case with no defendant sued in an individual capacity, plaintiff could recover a judgment, if at all, from a single source – the government agency.").

B. Alleged Violations of 42 U.S.C. § 1983 by Mann, Long, Sennett, Lemlier, Hendrix, Holloway, Davis, and Harrison (Count One)

In Count One, Pardue alleges that Officer Mann, Deputy Long, Forensic Specialist Sennett, Investigator Lemlier, Dist. Atty. Hendrix, and Asst. Dist. Attys. Holloway, Davis, and Harrison are liable under 42 U.S.C. § 1983 for violating his rights protected by the Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.[21,22]

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[21] Section 1983 is not itself a source of federal rights. *See Whiting v. Traylor,* 85 F.3d 581, 583 (11th Cir. 1996). Rather, it provides a mechanism for imposing civil liability against any person who, acting under the color of state law, deprives a United States citizen of a federal constitutional or statutory right. *See Baker v. McCollan,* 443 U.S. 137, 144 n.3, 99 S. Ct. 2689, 2694 n.3, 61 L. Ed. 2d 433 (1979).

[22] In Count One of the Amended Complaint, Pardue alleges, *inter alia,* that the acts or omissions of certain individual defendants

> constitutes obstruction of justice intended to deprive Pardue of his rights guaranteed *under the Constitution and laws of* the United States and *the State of Alabama* in violation of 42 U.S.C. § 1983.

Am. Compl. p. 35 ¶ 72 (emphasis added).

By this allegation, Pardue attempts to assert causes of action under § 1983 based on violations of state constitutional law and state statutory law.

Pardue makes a similar allegation in Count Two (*see* p. 41, ¶ 76) in which he alleges that certain individual defendants conspired "to deprive him of rights secured by the Constitution and laws of the United States and of the State of Alabama and

(Continued on following page)

1. Immunities

With the exception of Mann and Lemlier, each of the defendants in Count One has raised the affirmative defense(s) of absolute immunity and/or qualified immunity.[23]

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specifically deprived him of his liberty and freedom in violation of 42 U.S.C. § 1983."

Pardue makes a third similar allegation in his "Grounds for Liability" section of the Amended Complaint. (*See* p. 17 ¶ 43 in which he lists a series of rights "under the United States and State of Alabama Constitutions" of which defendants allegedly deprived him.).

All allegations that any of the individual defendants are liable under § 1983 for violations of state constitutional law and/or state statutory law are DISMISSED WITH PREJUDICE on the grounds that such allegations do not state a claim under § 1983. *See Gomez v. Toledo*, 446 U.S. 635, 100 S. Ct. 1920, 64 L.Ed.2d 572 (1980) ("By the plain terms of § 1983, two – and only two – allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person had deprived him of a *federal* right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law.") (emphasis added). *Accord, McKinley v. Kaplan*, 177 F.3d 1253, 12587-58 (11th Cir. 1999) (citing *Gomez*).

Because the law on this point is clear and well-established, the court is troubled by Pardue's inclusion of such allegations in his pleadings. This is yet another example of the problems with the draftmanship of the legal allegations in the Amended Complaint.

[23] As previously noted, Lemlier did not file a motion to dismiss. As for Officer Mann, the only basis for his motion to dismiss is his assertion that the state law claims against him are time-barred. Thus, the court will not address either defendant in discussing the immunity defenses to Pardue's § 1983

(Continued on following page)

Although the text of section 1983 does not expressly discuss immunity, the United States Supreme Court has recognized that, in appropriate circumstances, a defendant sued under section 1983 in his or her individual capacity may be entitled to either form of immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982); *Imbler v. Pachtman*, 424 U.S. 409, 430, 96 S. Ct. 984, 995, 47 L. Ed. 2d 128 (1976). The court will first address the general principles of these immunity defenses and then, where applicable, apply those principles to each purported constitutional violation.

a. Absolute Immunity

To protect the proper functioning of the judicial process, the Supreme Court has interpreted section 1983 as giving absolute immunity to functions "intimately associated with the judicial phase of the criminal process." *Malley v. Briggs*, 475 U.S. 335, 342, 106 S. Ct. 1092, 1097, 89 L. Ed. 2d 271 (1986) (quoting *Imbler*, 424 U.S. at 430, 96 S. Ct. at 995, and citing *Briscoe v. LaHue*, 460 U.S. 325, 334-35, 103 S. Ct. 1108, 1115-16, 75 L. Ed. 2d 96 (1983)).

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claims. *See Harlow v. Fitzgerald*, 457 U.S. 800, 815 n.24, 102 S. Ct. 2727, 2736 n.24, 73 L. Ed. 2d 396 (1982) (Section 1983 defendant must affirmatively raise an immunity defense); *Gomez v. Toledo*, 446 U.S. 635, 640 100 S. Ct. 1920, 1924, 64 L. Ed. 2d 572 (1980) ("Since qualified immunity is a defense, the burden of pleading it rests with the defendant.").

Accordingly, courts have recognized that witnesses – whether police officers or lay persons – have absolute immunity for testimony given during trials, *see Briscoe*, 460 U.S. at 329-30, 103 S. Ct. at 1112-13, and during grand jury proceedings. *See Kelly v. Curtis*, 21 F.3d 1544, 1553 (11th Cir. 1994) (citing *Strength v. Hubert*, 854 F.2d 421, 424-25 (11th Cir. 1988) (per curiam)).[24]

Similarly, a prosecutor is absolutely immune from liability for "acts undertaken . . . in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State." *Buckley v. Fitzsimmons*, 509 U.S. 259, 273, 113 S. Ct. 2606, 2615, 125 L. Ed. 2d 209 (1993). For instance, prosecutors have absolute immunity for actions taken during court appearances, such as presenting evidence and examining witnesses. *See Burns v. Reed*, 500 U.S. 478, 492, 111 S. Ct. 1934, 1942, 114 L. Ed. 2d 547 (1991). Prosecutors also have absolute immunity for initiating and pursuing criminal prosecutions, *see Imbler*, 424 U.S. at 431, 96 S. Ct. at 995; accordingly, prosecutors enjoy absolute immunity from suit for malicious prosecution. *See Malley*, 475 U.S. at 342-43, 106 S. Ct. at 1097. As the Eleventh Circuit explained:

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[24] Of course, such absolute immunity from § 1983 claims in civil suits has no application to prosecutions of witnesses for perjury.

> If prosecutorial immunity means anything, it means that prosecutors who take on the thankless task of public prosecution may prosecute, ably or poorly, as the case may be, answerable to the voters, and to disciplinary officers of the courts and of the bar; but not answerable to every person wrongfully prosecuted who can find a lawyer willing to allege that the prosecutor filed charges in bad faith, or for evil motives, or as a conspirator.

Elder v. Athens-Clarke County, 54 F.3d 694, 695 (11th Cir. 1995) (citing *Stump v. Sparkman*, 435 U.S. 349, 355-56, 98 S. Ct. 1099, 1104, 55 L. Ed. 2d 331 (1978)).

However, prosecutors are not protected by absolute immunity when they perform functions that are not associated with their role as advocates for the state. *See Mastroianni v. Bowers*, 173 F.3d 1363, 1366 (11th Cir. 1999). For example, the Supreme Court has declined to extend absolute immunity to the pre-indictment fabrication of evidence, *see Buckley*, 509 U.S. at 272-76, 113 S. Ct. at 2614-17, the post-indictment press conference, *see id.* at 276-78, 113 S. Ct. at 2617-18, or legal advice given to the police. *See Burns,* 500 U.S. at 496, 111 S. Ct. at 1944-45. Therefore, in determining whether a prosecutor enjoys absolute immunity, courts look to "the nature of the function performed, not the identity of the actor who performed it." *Buckley*, 509 U.S. at 269, 113 S. Ct. at 2613 (quoting *Forrester v. White,* 484 U.S. 219, 229, 108 S. Ct. 538, 545, 98 L. Ed. 2d 555 (1988)). The burden of showing the existence of

absolute immunity falls on the defendant. *See Malley,* 475 U.S. at 340, 106 S. Ct. at 1095-96.

b. Qualified Immunity

The doctrine of qualified immunity is intended to protect the effective functioning of government. Specifically, qualified immunity shields government officials from liability under section 1983 for harms caused by discretionary acts "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow,* 457 U.S. at 818, 102 S. Ct. at 2738. *See also Malley*, 475 U.S. at 341, 106 S. Ct. at 1096 (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law").

The test for deciding whether a government official is entitled to qualified immunity involves a two-step analysis. The defendant must first demonstrate that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred. *See Sims v. Metropolitan Dade County,* 972 F.2d 1230, 1236 (11th Cir. 1992). As the Eleventh Circuit recently emphasized, the proper inquiry "is not whether it was within the defendant's authority to commit the allegedly illegal act. . . . Instead, a court must ask whether the act complained of, if done for a proper purpose, would be within, or reasonably related to, the outer perimeter of an official's discretionary duties." *Maggio v. Sipple,* 211 F.3d 1346, 1350

n.2 (11th Cir. 2000). If the defendant meets this burden, then the plaintiff must show that the right allegedly violated was clearly established at the time the event in question occurred. *See Lancaster v. Monroe County,* 116 F.3d 1419, 1424 (11th Cir. 1997). To be clearly established, the contours of an asserted federal right "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987). In determining whether the applicable law was clearly established at the time the defendant acted, the court must look to the decisions of the Supreme Court of the United States and the United States Court of Appeals for the Eleventh Circuit. *See D'Aguanno v. Gallagher,* 50 F.3d 877, 881 n.6 (11th Cir. 1995). Where "a federal constitutional issue . . . has not been addressed by the United States Supreme Court or the Eleventh Circuit," clearly established law may include a decision by the Alabama Supreme Court which discusses that issue. *Courson v. McMillian*, 939 F.2d 1479, 1498 n.32 (11th Cir. 1991). Because the qualified immunity defense "focuses on the actual, specific details of concrete cases," *Walker v. Schwalbe,* 112 F.3d 1127, 1132 (11th Cir. 1997), a plaintiff must point to a controlling case, decided prior to the events in question, which clearly establishes a violation of federal rights based upon "materially similar" facts. *Lassiter v. Alabama*

A & M Univ., 28 F.3d 1146, 1150 (11th Cir. 1994) (en banc).[25]

With these principles in mind, the court turns to address Pardue's various section 1983 claims.

2. Fourth Amendment

The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. amend IV. In this case, Pardue contends that he was deprived of his "Fourth Amendment rights to be free from malicious prosecution, to be free of unreasonable seizure of the person and to be free of unreasonable or unwarranted

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[25] There is one "narrow exception" to the "rule requiring particularized case law to establish clearly the law." *Priester v. City of Riviera Beach*, 208 F.3d 919, 926 (11th Cir. 2000). Where a section 1983 plaintiff demonstrates "that the official's conduct lies so obviously at the very core of what the [constitutional or statutory provision] prohibits that the unlawfulness of the conduct was readily apparent to the official," then the official is not entitled to qualified immunity, notwithstanding the lack of clearly established law. *Smith v. Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1997). *Cf. K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990) ("There has never been a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages liability because no previous case had found liability in those circumstances."). Although Pardue's allegations that in 1973 Officer Mann brutally coerced a confession from him and then planted fabricated evidence to ensure Pardue's conviction may very well present such a case, the court need not resolve this issue because Mann has not raised the defense of qualified immunity.

restraints on personal liberty." Am. Compl. (doc. 52 ¶¶ 73(A)-(H)).

Although this phrase could be construed to allege three independent Fourth Amendment violations, the court interprets Pardue's amended complaint as instead stating a single claim for malicious prosecution. This conclusion is based on three factors. First, Pardue appears to have taken the above-quoted language directly from an Eleventh Circuit opinion which explains that a Fourth Amendment malicious prosecution claim incorporates unreasonable seizures as well as unwarranted restraints on personal liberty. *See Uboh v. Reno*, 141 F.3d 1000, 1003 (11th Cir. 1998) ("The Fourth Amendment right implicated in a malicious prosecution action is the right to be free of unreasonable seizure of the person – i.e., the right to be free of unreasonable or unwarranted restraints on personal liberty.") (quoting *Singer v. Fulton County Sheriff*, 63 F.3d 110, 116 (2nd Cir. 1995)). Second, Pardue has acknowledged that the alleged violations of his right to be free from unreasonable restraints on his personal liberty are recoverable through his malicious prosecution claim. *See* Pl.'s Resp. to Defs. Baldwin County and A.D. Long's Mot. to Dismiss (doc. 82 at 7). Third, the only Fourth Amendment cause of action discussed in Pardue's responses to the various motions to dismiss is his malicious prosecution claim. *See, e.g.*, Pl.'s Resp. to Renewed Mot. to Dismiss by Davis and Harrison (doc. 78 at 6); Pl.'s Resp. to Graddick's Renewed Mot. to Dismiss (doc. 79 at 10); Pl.'s Resp. to Mot. to Dismiss by Holloway (doc. 83 at

3). Accordingly, the court construes the Fourth Amendment allegations in Pardue's amended complaint as stating the single constitutional claim of malicious prosecution.

Having reached this conclusion, the court observes that the exact contours of Pardue's malicious prosecution claim are not clear. However, it appears that Pardue is arguing that Officer Mann, Deputy Long, Forensics Specialist Sennett, Investigator Lemlier, District Attorney Hendrix and Assistant District Attorneys Holloway, Davis and Harrison are liable under section 1983 because they pursued or otherwise participated in the murder prosecutions against Pardue despite their alleged knowledge that he was innocent.

a. Prosecuting Defendants

Dist. Atty. Hendrix and Asst. Dist. Attorneys Holloway, Davis, and Harrison assert that they have absolute immunity because they were functioning as advocates for the State of Alabama when they prosecuted Pardue for the Baldwin and Mobile County murders. In response, Pardue contends that absolute immunity does not attach because many of the alleged wrongful acts (such as allegedly threatening Pardue with the electric chair) did not occur "in a courtroom or judge's chambers." *See* Am. Compl. (doc. 52 ¶ 57). Needless to say, Pardue's *situs* argument must fail because it is "the nature of the function performed," *Buckley*, 509 U.S. at 269, 113 S. Ct. at

2613, rather than the prosecutor's physical location when performing that function, which controls whether absolute immunity applies. Here, the factual allegations in Pardue's amended complaint reveal that Dist. Atty. Hendrix and Asst. Dist. Attorney Holloway were fulfilling their role as advocates for the State during Pardue's prosecutions in 1973, as were Asst. Dist. Atty. Davis and Harrison during Pardue's re-prosecution in 1995. Accordingly, defendants Hendrix, Holloway, Davis, and Harrison are entitled to absolute immunity as to the § 1983 malicious prosecution claims asserted against them. *See Imbler*, 424 U.S. at 437, 96 S. Ct. at 998 (White, J., concurring) ("The general rule was, and is, that a prosecutor is absolutely immune from suit for malicious prosecution.").[26]

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[26] Pardue also seems to base his Fourth Amendment malicious prosecution claims on his allegations that Asst. Dist. Attys. Davis and Harrison used perjured testimony and an altered version of Pardue's tape-recorded confession in his 1995 trial and that Asst. Dist. Atty. Holloway perjured himself when he testified that the recording was accurate. *See* Am. Compl. (doc. 52 ¶¶ 39, 40, 55); Pl.'s Resp. to Renewed Mot. to Dismiss by Davis and Harrison (doc. 78 at 4-5). These actions, however, would not violate the Fourth Amendment. Rather, the government's use of fabricated evidence and perjured testimony at trial implicates the due process clause of the Fourteenth Amendment. *See United States v. Bailey*, 123 F.3d 1381, 1396 (11th Cir. 1997) (perjured testimony); *United States v. McClure*, 577 F.2d 1021, 1022-23 (5th Cir. 1978) (fabricated evidence). Moreover, Davis and Harrison have absolute immunity concerning the evidence they decide to offer at trial, *see Imbler*, 424 U.S. at 431 n.33, 96 S. Ct. at 995 n.33, and Holloway has absolute immunity for any

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b. Law Enforcement Defendants

Deputy Long and Forensic Spec. Sennett, on the other hand, argue that they are entitled to qualified immunity as to the § 1983 malicious prosecution claims. Because there is no dispute that they were government officials acting within the scope of their discretionary authority during the events in question, the issue is whether Deputy Long or Forensic Spec. Sennett violated a clearly established Fourth Amendment right of which a reasonable government official would have known.

A court considering the defense of qualified immunity "must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation." *Conn v. Gabbert*, 526 U.S. 286, 290, 119 S. Ct. 1292, 1295, 143 L. Ed. 2d 399 (1999).[27]

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testimony given during that trial. *See Jones v. Cannon*, 174 F.3d 1271, 1281 (11th Cir. 1999). Of course, the prosecutors' absolute immunity in this civil action does not prevent the state from prosecuting them for perjury in a criminal proceeding.

[27] In certain circumstances, however, it is proper for the court to begin its analysis by addressing whether the constitutional right was clearly established at the time the alleged wrongful act occurred. *See, e.g., Bishop v. Avera*, 177 F.3d 1233, 1236 n.7 (11th Cir. 1999); *Powers v. CSX Transp., Inc.*, 105 F. Supp.2d 1295, 1306-08, (S.D. Ala. 2000). Because those circumstances, for the most part, do not exist here, the court will determine whether Pardue has alleged the denial of an actual constitutional right.

To ascertain the elements of a section 1983 malicious prosecution claim, federal courts should look to state common law for guidance. *See Uboh,* 141 F.3d at 1004 (citing *Whiting,* 85 F.3d at 585 n.7; *Hilfirty v. Shipman,* 91 F.3d 573, 579 (3rd Cir. 1996)). In Alabama, the elements of malicious prosecution are: (1) a previous judicial proceeding initiated by the current defendant; (2) lack of probable cause in the institution of that proceeding; (3) malice by the current defendant in instituting that proceeding; (4) termination of that proceeding in favor of the current plaintiff;[28] and (5) damages to that plaintiff occurring as a result of that proceeding. *See Empiregas, Inc., of Elberta v. Feely*, 524 So. 2d 626, 627 (Ala. 1988).

Deputy Long and Forensics Spec. Sennett argue that the amended complaint does not contain an allegation sufficient to satisfy the first element of a malicious prosecution claim. In response, Pardue points to his assertion that Long and Sennett "either instituted and/or participated in a conspiracy to institute criminal proceedings against Pardue, or at the instance [sic] of . . . Sennett . . . criminal proceedings were instituted and ultimately terminated in Pardue's favor." Am. Compl. (doc. 52 ¶ 84). According to Pardue, this contention satisfies the pleading

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[28] *Accord Heck v. Humphrey,* 512 U.S. 477, 484, 114 S. Ct. 2364, 2371, 129 L. Ed. 2d 383 (1994) ("One element that must be alleged and proved in a [section 1983] malicious prosecution action is termination of the prior criminal proceeding in favor of the accused.").

requirement of Rule 8(a) of the Federal Rules of Civil Procedure because it gives Long and Sennett sufficient notice of the first element of Pardue's section 1983 malicious prosecution claims.

In civil rights actions, however, "more than mere conclusory notice pleading is required." *Fullman*, 739 F.2d at 556. Specifically, "[i]n pleading a section 1983 action, some factual detail is necessary." *Oladeinde,* 963 F.2d at 1485. Thus, while Pardue may have satisfied Rule 8(a), his claim will still be dismissed if he has failed to plead the requisite factual detail necessary to overcome the defense of qualified immunity.

Beyond the general allegation that Deputy Long and Forensics Spec. Sennett "instituted" criminal proceedings, Pardue has not alleged with specificity any facts which support his claim that either defendant initiated the criminal charges against him. That is, Pardue does not contend how Long or Sennett were responsible for his murder prosecutions. Pardue does not allege that they initiated the indictments against him, nor does he contend that they took an active part in encouraging his prosecution. *See Poff v. Hayes,* No. 1980938, 2000 WL 127194, at *5 (Ala. Feb. 2, 2000) ("one can be held liable for malicious prosecution when he takes some active part in the instigation or encouraging of the prosecution"). Thus, having failed to allege adequately a Fourth Amendment deprivation, Pardue cannot show that a clearly established constitutional right was violated. *See*

Burrell v. Board of Trustees of Ga. Military College, 970 F.2d 785, 792 (11th Cir. 1992) ("Without a constitutional violation, there can be no violation of a clearly established right."). Accordingly, defendant Long and defendant Sennett are entitled to qualified immunity as to Pardue's § 1983 malicious prosecution claims.

3. Fifth Amendment

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." U.S. Const. amend V. Here, Pardue asserts that Officer Mann, Deputy Long, Forensics Spec. Sennett, Investigator Lemlier, Dist. Atty. Hendrix and Asst. Dist. Attys. Holloway, Davis, and Harrison are liable under section 1983 for violating the following rights under the Fifth Amendment: (1) the right against deprivation of life and liberty without due process of law; (2) the right against self-incrimination; (3) the right to counsel; and (4) the right to exculpatory evidence pursuant to *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). *See* Am. Compl. (doc. 52 ¶¶ 73(A)-(H)). In response, defendants Long, Sennett, Hendrix, Holloway, Davis, and Harrison seek dismissal on the grounds that Pardue has failed

to state a claim and that, even if he has, they are entitled tc qualified immunity.[29]

a. Due Process

The due process clause of the Fifth Amendment applies only to actions of the federal government; it does not limit actions of state officials or entities. *See Bartkus v. Illinois,* 359 U.S. 121, 124, 79 S. Ct. 676, 678, 3 L. Ed. 2d 684 (1959). Because Pardue does not allege that any of the defendants are federal officials, the court will dismiss all claims which allege a violation of Pardue's Fifth Amendment due process rights.

b. *Miranda v. Arizona*

Pardue's next two Fifth Amendment claims are premised on the defendants' alleged failure to comply with the procedures set forth in *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), during Pardue's interrogation at the Saraland Police Department in 1973. According to Pardue, the defendants are liable under section 1983 because they did not give him *Miranda* warnings or provide him with counsel during the course of that interrogation.

Since the *Miranda* decision was announced in 1966, a number of courts, including the Eleventh

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[29] The court concludes that these defendants were each acting within their discretionary authority in relation to Pardue's Fifth Amendment claims.

Circuit, have held that the failure to comply with the *Miranda* procedures does not give rise to a cause of action under section 1983 because those procedures are merely prophylactic safeguards rather than rights protected by the Fifth Amendment. *See Jones v. Cannon,* 174 F.3d 1271, 1291 (11th Cir. 1999) ("failing to follow *Miranda* procedures triggers the prophylactic protection of the exclusion of evidence, but does not violate any substantive Fifth Amendment right such that a cause of action for money damages under § 1983 is created"); *Giuffre v. Bissell,* 31 F.3d 1241, 1256 (3rd Cir. 1994) ("violations of the prophylactic *Miranda* procedures do not amount to violations of the Constitution itself."); *Warren v. City* of *Lincoln,* 864 F.2d 1436, 1442 (8th Cir. 1989) ("The reading of *Miranda* warnings is a procedural safeguard rather than a right arising out of the fifth amendment."); *Bennett v. Passic*, 545 F.2d 1260, 1263 (10th Cir. 1976) ("The Constitution and laws of the United States do not guarantee [plaintiff] the right to *Miranda* warnings."); *Thornton v. Buchmann,* 392 F.2d 870, 874 (7th Cir. 1968) (failure to give *Miranda* warnings prevents introduction of criminal defendant's statements in a criminal trial, but has no significance in a civil rights action). Under the binding precedent of *Cannon,* it would, therefore, seem that Pardue's *Miranda*-based claims must fail.

Last year, however, the United States Supreme Court clarified that the "prophylactic" safeguards announced in *Miranda* are in fact constitutional rights in themselves. *See Dickerson v. United States,*

530 U.S. 428, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000). Thus, it appears that a criminal defendant may state a section 1983 cause of action for a Fifth Amendment deprivation where a law enforcement officer does not follow the guidelines set forth in *Miranda*. Nevertheless, given that the Eleventh Circuit in *Jones*, without the guidance of *Dickerson*, reached the opposite conclusion just last year, it is apparent that Pardue did not have a clearly established constitutional right to receive *Miranda* protections during his interrogation in 1973. Deputy Long, Forensics Spec. Sennett, Dist. Atty. Hendrix, and Asst. Dist. Attys. Holloway, Davis, and Harrison are entitled to qualified immunity as to Pardue's section 1983 claims based upon a failure to give him *Miranda* warnings or to provide him with counsel during his 1973 interrogation at the Saraland Police Department.

c. Self-incrimination

While Pardue cannot pierce the shield of qualified immunity with regard to the alleged failure to comply with *Miranda*, this does not end the inquiry into whether Pardue's underlying Fifth Amendment right against self-incrimination was violated during his interrogation at the Saraland Police Department in 1973. As the former Court of Appeals for the Fifth Circuit has recognized, the "privilege against compulsory self-incrimination is a creature of federal law secured by the Constitution of the United States, and if abridged under appropriate circumstances it may

indeed support a claim under § 1983." *Bradt v. Smith,* 634 F.2d 796, 800 (5th Cir. Jan. 1981).[30]

The plain language of the Fifth Amendment gives an individual the right not to be a witness against himself in a criminal proceeding. It is well settled that this protection applies during a custodial interrogation, because that is when the criminal proceeding starts. *See Miranda,* 384 U.S. at 477, 86 S. Ct. at 1629; *see also Michigan v. Tucker,* 417 U.S. 433, 443, 94 S. Ct. 2537, 2363, 41 L. Ed. 2d 182 (1974) ("the Court in *Miranda,* for the first time, expressly declared that the Self-Incrimination Clause was applicable to state interrogations at a police station"). It is also generally held that a Fifth Amendment deprivation does not occur until a coerced statement is actually used against the defendant in a criminal proceeding. *See Bradt,* 634 F.2d at 800 ("Bradt does not allege that the contents of those records could be used against him in a criminal proceeding, or could lead to other evidence that might be so used. . . . Thus, no reading of the facts . . . could lead to the conclusion that a deprivation of his fifth amendment privilege has occurred."); *Riley v. Dorton*, 115 F.3d 1159, 1165 (4th Cir. 1997) (*en banc*) ("Any Fifth Amendment claim here thus fails, because Riley never made a statement . . . that was used at trial.");

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[30] In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), Court of Appeals for the Eleventh Circuit adopted as binding precedent all decisions issued by the former Court of Appeals for the Fifth Circuit prior to October 1, 1981.

Weaver v. Brenner, 40 F.3d 527, 535 (2nd Cir. 1994) (holding that the "use or derivative use of a compelled statement at any criminal proceeding against the declarant" and not "the act of coercing an incriminating statement from a suspect" constitutes a violation of "that person's Fifth Amendment rights"); *Wilkins v. May,* 872 F.2d 190, 194 (7th Cir. 1989) ("the Fifth Amendment does not forbid the forcible extraction of information but only the use of information so extracted as evidence in a criminal case"); *but see Cooper v. Dupnik,* 963 F.2d 1220, 1238-45 (9th Cir. 1992) (*en banc*) (holding that the Fifth Amendment is violated as soon as a criminal defendant is compelled to make an incriminating statement). Thus, to state a claim under section 1983 for a deprivation of his Fifth Amendment right against self-incrimination, Pardue must allege that during a custodial interrogation he was coerced to give an incriminating statement which was subsequently used in a criminal proceeding.

Pardue's allegations satisfy each of these elements. Specifically, Pardue alleges sufficient facts to show that he was coerced to confess to the Baldwin and Mobile County murders during a seventy-eight hour interrogation at the Saraland Police Station, *see* Am. Compl. (doc. 52 ¶¶ 29, 44, 52, 54), and that his confession was used against him at his 1973 and 1995 murder trials, *see id.* at ¶¶ 39, 49, in which he was convicted of murder and sentenced to life in prison, *see id.* at ¶¶ 34, 40. *Accord Pardue v. Alabama,* 695 So. 2d 199 (Ala. Crim. App. 1996) (reversing Pardue's 1995 conviction on the ground that his confession

introduced at trial was coerced during his 1973 custodial interrogation at the Saraland Police Station), *cert. denied,* No. 1960535 (Ala. May 16, 1997).[31] These allegations state a claim for a violation of Pardue's Fifth Amendment right against self-incrimination.

Upon review of the amended complaint, the court concludes that that pleading states a Fifth Amendment self-incrimination claim against defendant Mann only. Although one sentence in the amended complaint seems to suggest that every defendant named in Count One participated in Pardue's interrogation,[32] the only individuals who are ever identified as actually doing so are Chief Pridgen, Chief Deputy Travis, Deputies Estes and Strohe, and Officers Mann, Creekmore, and Squires. *See* Am.

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[31] Although the court may not take judicial notice of another court's finding of fact, *see United States v. Jones,* 29 F.3d 1549, 1553 (11th Cir. 1994), the court may take judicial notice of the Alabama Court of Criminal Appeals' decision for the limited purpose of recognizing the judicial action taken. *See International Molders and Allied Workers, AFL-CIO v. Buchanan Lumber. Birmingham,* 459 F. Supp. 950, 953 n.3 (N.D. Ala. 1978), *affirmed,* 618 F.2d 782 (5th Cir. 1980). The court further notes that defendants have urged the court to take judicial notice of the published decisions of the Supreme Court of Alabama and the Alabama Court of Criminal Appeals as they relate to Pardue's underlying prosecutions. *See, e.g.,* Mobile County's Br. in Support of Renewed Mot. to Dismiss (doc. 56 at 4 n.2).

[32] "All were at the Saraland Police Station during the long and unlawful interrogation of Pardue and/or thereafter participated in the conspiracy." Am. Compl. (doc. 52 ¶ 43).

Compl. (doc. 52, ¶¶ 27, 29, 44). Of those specifically identified as participating, Pardue named only one – Officer Mann – as a defendant in this action. There are no factual allegations in the amended complaint which suggest that defendants Deputy Long, Forensics Spec. Sennett, Investigator Lemlier, Dist. Atty. Hendrix, or Asst. Dist. Attys. Davis and Harrison were present during, let alone participated in, Pardue's interrogation. As for defendant Asst. Dist. Atty. Holloway, although Pardue alleges that he was present at the Saraland Police Department during the interrogation, *see id.* at ¶ 55, there is no contention that he actually participated in that interrogation. Accordingly, because Pardue asserts a Fifth Amendment self-incrimination claim against defendant Officer Mann only and because Officer Mann has not filed a motion to dismiss based on qualified immunity, there is no motion before the court as to this Fifth Amendment claim.

d. *Brady v. Maryland*

Pardue asserts that defendants' alleged failure to produce exculpatory evidence under *Brady v. Maryland, supra,* violates the Fifth Amendment. The Eleventh Circuit has held that section 1983 provides a cause of action for a *Brady* violation. *See McMillian v. Johnson,* 88 F.3d 1554, 1567 n.12 ("*McMillian "I"*), *amended on reh'g on other grounds,* 101 F.3d 1363 (11th Cir. 1996). Contrary to Pardue's suggestions, however, a state's failure to produce exculpatory evidence does not implicate the Fifth Amendment;

rather, it protects an accused's Fourteenth Amendment due process right to a fair trial. *See Brady,* 373 U.S. at 86, 83 S. Ct. at 1196. Accordingly, the court concludes that the exculpatory evidence claims based upon a purported violation of the Fifth Amendment are due to be dismissed.

4. Eighth Amendment

The Eighth Amendment proscribes the use of cruel and unusual punishment. *See* U.S. Const. amend, VIII. In this case, Pardue contends that Officer Mann, Deputy Long, Forensics Spec. Sennett, Invest. Lemlier, Dist. Atty. Hendrix, and Asst. Dist. Attys. Holloway, Davis, and Harrison deprived him of his right to avoid such punishment. *See* Am. Compl. (doc. 52 ¶¶ 73(A)-(H)). The flaw with this claim is that the Eighth Amendment's protection from cruel and unusual punishment applies only to post-trial convicts – not pre-trial detainees. *See Tittle v. Jefferson County Comm'n,* 10 F.3d 1535, 1539 n.3 (11th Cir. 1994) (*en banc*) (citing *Ingraham v. Wright,* 430 U.S. 651, 671 n.40, 97 S. Ct. 1401, 1412 n.40, 51 L. Ed. 2d 711 (1977)). Unlike a convicted prisoner, a pre-trial detainee is protected by the due process clause of the Fourteenth Amendment. *See Belcher v. City of Foley,* 30 F.3d 1390, 1396 (11th Cir. 1994). Because Pardue does not complain of any punishment that occurred after he was convicted of the murders – other than the bare assertion that he was wrongfully convicted and should never have been imprisoned in the first place – the court concludes that the claims premised

upon a purported violation of the Eighth Amendment are due to be dismissed.

5. Fourteenth Amendment

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1. Pardue alleges that Officer Mann, Deputy Long, Forensics Spec. Sennett, Dist. Atty. Hendrix, and Asst. Dist. Atty. Holloway violated his Fourteenth Amendment right to "due process of law as a pretrial detainee." Am. Compl. (doc. 52 ¶¶ 73(A)-(C), (E), (H)).[33] Although Pardue does not specifically identify the claims he is attempting to assert under the Fourteenth Amendment's broad umbrella of due process, the court gleans five possible due process claims from the amended complaint: (1) Officer Mann beat Pardue and deprived him of food, water, and sleep for at least seventy-eight hours during his interrogation at the Saraland Police Station in 1973, *see id.* at ¶¶ 29, 44; (2) Asst. Dist. Atty. Holloway failed to intervene and stop Officer Mann, *see id.* at ¶ 55; (3) Mann and Holloway fabricated evidence, *see id.* at ¶ 32; (4) Deputy Long and Forensics Spec.

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[33] Pardue also makes two passing references to the equal protection clause of the Fourteenth Amendment. *See id.* at ¶¶ 43, 45. However, Pardue does not actually assert an equal process violation in any of his eight causes of action, thereby rendering these references superfluous and obviating the need for a discussion of equal protection law.

Sennett concealed exculpatory evidence, *see id. at* ¶¶ 58, 62; and (5) Dist. Atty. Hendrix concealed exculpatory evidence and used perjured testimony when he prosecuted Pardue in 1973 for the Baldwin County murder, *see id. at* ¶ 47.[34] The court will address each claim in turn.

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[34] In his response to Asst. Dist. Atty. Holloway's motion to dismiss, Pardue states:

> "Defendant Holloway, like all other prosecutors, has an affirmative duty to disclose all material exculpatory evidence to the defense. *Brady v. Maryland,* 373 U.S. 83 (1963)."

Pl.'s Resp. to Mot. to Dismiss filed by Holloway (doc. 83 at 4). Whatever Pardue's intentions may have been in making this statement, it is apparent that Pardue does not state a *Brady* claim against Holloway. To do so, Pardue must have alleged that Holloway failed to disclose exculpatory or impeachment evidence that was material. *See Giglio v. United States,* 405 U.S. 150, 153-54, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1972). However, Pardue does not allege in the amended complaint that defendant Holloway withheld any material evidence from defense attorney Stanard; due to the absence of such an allegation, Pardue has not stated a Brady claim against Holloway.

a. Pardue's Interrogation[35]

It is well established that "pretrial detainees may bring § 1983 actions to redress violations of their rights under the Due Process Clause of the Fourteenth Amendment, which 'protects a pretrial detainee from the use of excessive force that amounts to punishment.'" *Vineyard v. County of Murray,* 990 F.2d 1207, 1211 (11th Cir. 1993) (*per curiam*) (quoting *Graham v. Connor,* 490 U.S. 386, 395 n.10, 109 S. Ct. 1865, 1871 n.10, 104 L. Ed. 2d 443 (1989)); *see also Cottrell v. Caldwell,* 85 F.3d 1480, 1490 (11th Cir. 1996) ("Claims involving the mistreatment of arrestees or pretrial detainees in custody are governed by the Fourteenth Amendment's Due Process Clause."). Thus, the court must apply the Fourteenth Amendment substantive due process standard to determine whether Pardue's complaints about his treatment during his 1973 interrogation state a claim.[36]

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[35] Pardue asserts his Fourteenth Amendment claim regarding the interrogation against Officer Mann. As noted above, Officer Mann has not filed a motion to dismiss based on qualified immunity. Under these circumstances, the court would not normally undertake a *sua sponte* constitutional analysis to determine whether the plaintiff has stated a section 1983 claim. However, because Pardue's Fourteenth Amendment claim against Officer Mann is directly related to Pardue's failure-to-intervene claim against Asst. Dist. Atty. Holloway (who has filed a motion to dismiss based on qualified immunity), it is necessary to address the first claim so as to provide context for the second.

[36] The court pauses to acknowledge, however, that "where a particular amendment provides an explicit textual source of constitutional protection against the conduct of which Plaintiff

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In determining whether the use of force violates substantive due process, courts consider several factors, including "the need for force, the relationship between the need for force and the amount of force used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Wilson v.*

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complains, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing the claim." *Harrison v. Wille*, 132 F.3d 679, 682 n.5 (11th Cir. 1998) (*per curiam*) (quoting *Graham*, 490 U.S. at 395, 109 S. Ct. at 1871) (certain internal quotations omitted). Thus, "[c]ourts will not consider substantive due-process claims when there is an express textual source of protection in the Constitution." *El Dia, Inc. v. Rossello*, 30 F. Supp.2d 160, 174 (D. P.R. 1998). It is for this reason that the court analyzed Pardue's allegations regarding the coercive nature of his interrogation in the context of the Fifth Amendment's prohibition against self-incrimination rather than under the Fourteenth Amendment's due process clause.

That said, not all of Pardue's substantive due process claims which arise from his alleged mistreatment during his interrogation are automatically subsumed by the Fifth Amendment's self-incrimination clause. For instance, where, as here, a suspect alleges that he gave an incriminating statement after being beaten and deprived of basic life necessities during a lengthy custodial interrogation, the suspect may seek redress under section 1983 for two separate constitutional harms. First, the suspect may state a substantive due process claim for the injuries he received as a result of the beating and the lack of food, water and sleep. Second, the suspect may state a self-incrimination claim for the injuries that arise from the use of his compelled confession at a later criminal proceeding. Thus, even though the underlying conduct is basically the same, two separate causes of action are available due to the distinct difference between the resulting harms.

Northcutt, 987 F.2d 719, 722 (11th Cir. 1993). Courts also take into consideration "the severity of the crime, whether the suspect poses an immediate threat, and whether the suspect is resisting or fleeing." *Post v. City of Fort Lauderdale,* 7 F.3d 1552, 1559 (1993), *as modified,* 14 F.3d 583 (11th Cir. 1994) (*per curiam*). With regard to providing basic necessities such as food, water and sleep, "to violate due process, the conditions of which [a pretrial detainee] complains must, at a minimum, have deprived him 'of a single human need'" *Jordan v. Doe,* 38 F.3d 1559, 1565 (11th Cir. 1994) (quoting *Wilson v. Seiter,* 501 U.S. 294, 305, 111 S. Ct. 2321, 2327, 115 L. Ed. 2d 271 (1991)). "A state's failure to provide any food to incarcerated detainees, for example, clearly would violate the due process protection of a pretrial detainee regardless of the state's objective." *Hamm v. DeKalb County,* 774 F.2d 1567, 1573 (11th Cir. 1985).

Pardue alleges that Officer Mann (together with several other law enforcement officers who are not parties in this action) beat Pardue and deprived him of food, water, and sleep for at least seventy-eight hours. *See* Am. Compl. (doc. 52 ¶¶ 29, 44). There is no indication that Pardue posed a threat to the officers, was attempting to resist, or was trying to flee. Rather, Pardue alleges that he was subjected to this mistreatment for the sole purpose of obtaining a confession. *See id.* at ¶¶ 29, 76. Applying the standards identified in the preceding paragraph, the court concludes that Pardue states a Fourteenth Amendment substantive due process claim against Officer

Mann concerning his actions during the interrogation.

b. Failure to Intervene

It is a closer question whether Pardue states a substantive due process claim against Assist. Dist. Atty. Holloway for his alleged nonfeasance during that interrogation. In this circuit, it is well settled that a police officer may be held directly liable under section 1983 for failing to intervene when another officer uses excessive force. *See Priester v. City of Riviera Beach,* 208 F.3d 919, 924 (11th Cir. 2000); *Ensley v. Soper,* 142 F.3d 1402, 1407-08 (11th Cir. 1998); *Riley v. Newton*, 94 F.3d 632, 635 (11th Cir. 1996); *Byrd v. Clark,* 783 F.2d 1002, 1007 (11th Cir. 1986); *Fundiller v. City of Cooper City,* 777 F.2d 1436, 1441-42 (11th Cir. 1985). But the Eleventh Circuit has not addressed the specific question presented in this case, which is whether a prosecutor has a duty to intervene during a police beating of a pre-trial detainee.

In *Wilkinson v. Ellis,* 484 F. Supp. 1072, 1085 (E.D. Pa. 1980), the court held that prosecutors have a duty to intervene and stop police beatings in their presence, and that the failure to do so may impose direct liability under section 1983. In the *Wilkinson* court's view, "[w]hile the prosecutor's function is clearly different from that of a police officer, he is nonetheless a quasi-judicial officer [under Pennsylvania law] with a duty to seek impartial justice, to see that no innocent man suffers and no guilty man

escapes." *Id.* (internal citation omitted). Similarly, Alabama law has long recognized that a prosecutor is a "quasi[-]judicial officer representing the people of the state and is presumed [to] act impartially in the interest only of justice." *Reeves v. Alabama,* 97 So. 152, 153 (Ala. Ct. App. 1923). Accordingly, this court holds that a prosecutor has a duty to intervene and stop excessive force being used by the police against a pre-trial detainee where the prosecutor is in a position to do so. *Crum & Forster. Ensley v. Soper,* 142 F.3d 1402, 1407-08 (11th Cir. 1998) (liability for failing to intervene arises only when an officer is in a position to intervene and does not do so). Because Pardue alleges that Assist. Dist. Atty. Holloway was at the Saraland Police Department and made no effort to stop the unlawful interrogation occurring in his presence, *see* Am. Compl. (doc. 52 ¶ 55), the court concludes that Pardue states a Fourteenth Amendment substantive due process claim against Holloway for failing to intervene.

Because Holloway was plainly acting in an investigatory capacity during the interrogation, he does not pursue absolute immunity. Rather, Asst. Dist. Atty. Holloway argues that he is entitled to qualified immunity because there was no clearly established duty in 1973 to intervene and stop Pardue's interrogation.[37] After due consideration, the court agrees. Pardue has not cited, and the court has not located, any decision

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[37] The parties do not dispute that Asst. Dist. Atty. Holloway was acting in a discretionary capacity when he was at the Saraland Police Department during Pardue's interrogation.

by the United States Supreme Court, the Eleventh Circuit, or the Alabama Supreme Court which held – prior to Pardue's interrogation in May 1973 – that a prosecutor has a duty to intervene and stop an unlawful interrogation by a law enforcement officer. Nor, for that matter, has this court even found a subsequent decision by these appellate courts which imposes such a duty or even addresses this specific issue. Indeed, it appears that the 1980 *Wilkinson* decision by the federal district court in Pennsylvania is the first published case ever to impose liability against prosecutors for their failure to intervene when the police use excessive force. Thus, Asst. Dist. Atty. Holloway's duty to intervene in this case was not clearly established in 1973. Accordingly, the court concludes that Asst. Dist. Atty. Holloway is entitled to qualified immunity as to Pardue's Fourteenth Amendment failure-to-intervene claim.

c. Fabrication of Evidence

Pardue's next Fourteenth Amendment claim arises from his allegation that Officer Mann and Asst. Dist. Atty. Holloway fabricated evidence to obtain a conviction against Pardue for the Mobile and Baldwin County murders. Specifically, Pardue contends that Mann, Holloway, and others cleaned and oiled the dusty, cobweb-covered shotgun found at J.B. Duncan's house with red rags, and that Mann then planted the rags in John Brown's station wagon and "found" them during a subsequent search of Brown's car. Thereafter, Mann and Holloway claimed that this shotgun was the murder weapon, and it was offered as

evidence in Pardue's 1973 trial. These allegations state a claim under section 1983 for a violation of Pardue's due process rights to a fair trial. *See Jones,* 174 F.3d at 1289 ("Using or planting false evidence in an effort to obtain a conviction violates the Constitution."). Although defendant Mann has not moved for a dismissal of this claim based on qualified immunity, Asst. Dist. Atty. Holloway has so moved.

The United States Supreme Court has expressly held that prosecutors are not entitled to absolute immunity from charges that they fabricated evidence prior to obtaining an indictment against a suspect. *Buckley,* 509 U.S. at 272-76, 113 S. Ct. at 2614-17. Thus, the success or failure of Asst. Dist. Atty. Holloway's motion to dismiss depends on whether he has qualified immunity for this claim.

Because Holloway was acting within his discretionary authority,[38] the question becomes whether

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[38] When addressing the issue of qualified immunity, the threshold question is, of course, whether the defendant was acting within the scope of his discretionary authority when he committed the act of which the plaintiff complains. In his amended motion to dismiss, (doc. 68), Asst. Dist. Atty. Holloway asserts that he was acting within the scope of his discretionary authority at the relevant time. In his response, (doc. 83), Pardue acknowledged Holloway's assertion on this issue, but did not respond thereto, focusing instead on the issue of whether a clearly-established right existed in 1973. Accordingly, the court concludes that Asst. Dist. Atty. Holloway was acting within his discretionary authority with respect to his alleged participation in the cleaning of the shotgun.

Holloway violated a clearly established right when he allegedly fabricated evidence in 1973. The answer depends on how broadly or narrowly the specific question is cast. If the issue is whether it was clearly established in 1973 that an assistant district attorney could not clean and oil a dusty shotgun and later allege that it was the murder weapon, then the answer is obviously "no," because there are no cases which define the wrong at this level of particularity. But it is not necessary that "the very action in question has previously been held unlawful" to overcome the defense of qualified immunity; rather, the contours of the right need only be sufficiently clear so that a reasonable official would understand that what he or she is doing violates that right. *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987). Moreover, the right at issue here is "appropriately identified as the right not to be deprived of liberty as a result of the fabrication of evidence by a government officer" rather than the more narrow "right not to be deprived of liberty as a result of" "fabrication of evidence by a prosecutor acting in an investigating capacity." *Zahrey v. Coffey,* 221 F.3d 342, 349 (2nd Cir. 2000).

It was clearly established in 1973 that a government official's fabrication of incriminating evidence violates a criminal defendant's due process right to a fair trial. *See Napue v. Illinois*, 360 U.S. 264, 266-70, 79 S. Ct. 1173, 1177, 3 L. Ed. 2d 1217 (1959); *Wiman v. Powell,* 293 F.2d 605, 608 (5th Cir. 1961). As Chief Justice Warren wrote fourteen years before Asst.

Dist. Atty. Holloway allegedly cleaned and oiled a dusty shotgun for use against Pardue in the Baldwin County murder trial, "it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue*, 360 U.S. at 269, 79 S. Ct. at 1177. Pardue was sentenced to life in prison after the shotgun was used to obtain his conviction for murder. Accordingly, the court concludes that Asst. Dist. Atty. Holloway is not entitled to qualified immunity as to Pardue's fabrication-of-evidence claim.[39]

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[39] This ruling does not mean that Asst. Dist. Atty. Holloway cannot later establish that he is entitled to qualified immunity on Pardue's fabrication-of-evidence claim. Should discovery reveal no factual basis for this (or any other remaining section 1983) claim, Holloway may attempt to establish qualified immunity in a motion for summary judgment. *See Behrens v. Pelletier*, 516 U.S. 299, 306, 116 S. Ct. 834, 839, 133 L. Ed. 2d 773 (1996). Additionally, even if summary judgment on this issue was not appropriate due to a genuine issue of material fact, Asst. Dist. Atty. Holloway may request the court to revisit the issue if the facts proven at trial do not establish Pardue's fabrication-of-evidence claim. *See Stone v. Peacock*, 968 F.2d 1163, 1166 (11th Cir. 1992) (per curiam). Given Pardue's allegations, however, Holloway is not entitled to qualified immunity through the procedural vehicle of a motion to dismiss.

d. Failure to Turn Over Exculpatory Evidence

Pardue asserts that Deputy Long and Forensic Spec. Sennett did not disclose exculpatory and impeachment evidence as required by *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). "*Brady* protects an accused's due process rights to a fair trial." *McMillian I*, 88 F.3d at 1567. As the Supreme Court explained in *Brady*, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87, 83 S. Ct. at 1196-97. Although law enforcement officers and investigators have no duty under *Brady* to disclose exculpatory and impeachment evidence directly to the defense, *see Kelly*, 21 F.3d at 1552, they must turn over such evidence to the prosecutor. *See McMillian I*, 88 F.3d at 1567.[40] As previously noted, the failure to do so may subject the officer or investigator to liability under section 1983. *See id.* at 1567 n.12.

In this case, Pardue contends that Deputy Long concealed police reports produced in connection with the Baldwin County murder scene, failed to report that Ronald Rider owned the crowbar that was found

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[40] Thus, Forensic Spec. Sennett's blanket assertion that he "had no obligation to disclose any *Brady* evidence," Renewed Mot. to Dismiss of Def. Sennett (doc. 59 at 4), is simply incorrect.

next to his body, and "stood silent" when he knew that other law enforcement officers were falsely attempting to convict Pardue. *See* Am. Compl. (doc. 52 ¶ 62). Pardue similarly asserts that Forensics Spec. Sennett was present when the red rags were "found" in John Brown's car and that he never revealed that official forensics reports concerning the murders contained false information. *See id.* at ¶ 58.

In *McMillian I*, the Eleventh Circuit emphasized that officers violate *Brady* only where the withheld evidence was material. 88 F.3d at 1570 (vacating district court's order denying officers qualified immunity against section 1983 *Brady* claim and remanding for determination whether reasonable officials would have known that withheld evidence was material). Evidence is material if there is a reasonable probability that its suppression would "undermine[] confidence in the outcome of the trial." *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 1566, 131 L. Ed. 2d 490 (1995) (quoting *United States v. Bagley*, 473 U.S. 667, 678, 105 S. Ct. 3375, 3381, 87 L. Ed. 2d 481 (1985)). In determining materiality, the non-disclosed evidence "must be evaluated collectively, not item-by-item." *McMillian I*, 88 F.3d at 1570. Moreover, the court should view such evidence without the benefit of hindsight and should instead decide whether a reasonable official would have known that the non-disclosed evidence was material at the time they failed to disclose it. *See id.* at 1570 & n.21.

With these considerations in mind, the court holds that Pardue fails to demonstrate that Deputy

Long or Forensic Spec. Sennett violated a clearly established right. The court reaches this conclusion for several reasons. First, Pardue does not allege that any of the allegedly non-disclosed evidence was material, even though this is an essential element of a *Brady* claim. *See Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1972) ("A finding of materiality of the evidence is required under *Brady*."); *see also Bagley*, 473 U.S. at 699, 105 S. Ct. at 3392 (Marshall, J., dissenting) (acknowledging that the majority's holding in *Bagley* was that "due process does not require the prosecutor to turn over evidence unless the evidence is 'material'). Nor does Pardue allege any specific facts which demonstrate that the supposedly exculpatory evidence, in its collective entirety, was material. *See Kyles*, 514 U.S. at 437, 115 S. Ct. at 1557 ("showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more."). Pardue does not state in the amended complaint what exculpatory evidence was in the police reports or why the ownership of the crowbar was material to the trial. Thus, Pardue does not allege any specific facts which lead the court to conclude that the collective evidence supposedly suppressed by Deputy Long, or the forensics reports allegedly concealed by Forensic Spec. Sennett, actually contained material exculpatory information.[41]

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[41] As for the red rags, Pardue does not explain the relevance of Sennett's presence at their discovery. Pardue does not allege,

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Second, although Pardue alleges that Deputy Long and Forensic Spec. Sennett did not disclose exculpatory information, he never identifies the person to whom that information was allegedly non-disclosed. If this cause of action is based on the alleged failure to turn over exculpatory evidence directly to him, then this claim clearly fails. *See Kelly,* 21 F.3d at 1552 (police have no obligation to disclose exculpatory evidence directly to the defense). On the other hand, if Pardue's claim is premised upon the alleged failure by Deputy Long or Forensic Spec. Sennett to disclose this evidence to the prosecutor, he does not say so. Therefore, Pardue once again fails to satisfy the heightened pleading standard.

Finally, and perhaps most importantly, Pardue has not cited, and the court has not located, a single case which shows that an Alabama law enforcement officer or investigator (as opposed to a prosecutor) had a clearly established duty in 1973 to disclose exculpatory information contained in an official investigation report. Although the court in *McMillian I* concluded that the officers' duty to disclose exculpatory evidence was clearly established under the facts of that case in 1987, that decision relied upon cases which were decided no earlier than 1979. 88 F.3d at 1568-70 (citing *Lassiter*, 28 F.3d at 1150 (11th Cir. 1994); *Geter v. Fortenberry*, 849 F.2d 1550, 1559 (5th

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for example, that Sennett knew they were planted or that the physical evidence revealed such a fact.

Cir. 1988); *Ross v. Hopper,* 716 F.2d 1528, 1534 (11th Cir. 1983); *United States v. Antone*, 603 F.2d 566, 569-70 (5th Cir. 1979);[42] *Freeman v. State of Georgia*, 599 F.2d 65, 69 (5th Cir. 1979)).[43] Given the lack of judicial guidance available to Alabama law enforcement officers and investigators in this particular area of the law, the court concludes that Deputy Long and Forensics Spec. Sennett are entitled to qualified immunity because their duty under *Brady* to disclose any material exculpatory evidence to the prosecution was not clearly established in 1973.[44]

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[42] The court of appeals acknowledged that *Geter,* as a Fifth Circuit decision, could not create clearly established law in this circuit. *See McMillian I,* 88 F. 3d at 1569 n.17.

[43] The *McMillian I* court also references the Supreme Court's 1963 *Brady* decision, as well as the Court's 1972 *Giglio* decision, in holding that the officers had a clearly established obligation to disclose exculpatory and impeachment evidence to the prosecution in 1987. *McMillian I*, 88 F.3d at 1569 ("*Brady* and its progeny made clear that an accused's due process rights are violated when the prosecution fails to disclose exculpatory or impeachment evidence to the defense, regardless of whether the prosecutor himself acted in bad faith or even knew of the evidence.") (citing *Giglio*, 405 U.S. at 153-54, 92 S. Ct. at 766)). The *McMillian I* court acknowledged, however, that "[t]he Supreme Court has not explicitly addressed the disclosure duties of the police and other investigators under *Brady*." *Id.* at 1567. Accordingly, this court declines to construe *Brady* or *Giglio* as providing clearly established law to Forensics Spec. Sennett or Deputy Long.

[44] These defendants were, at all relevant times, acting in their discretionary capacity as a deputy sheriff and a state forensics specialist, respectively.

e. Prosecutorial Misconduct

In his final Fourteenth Amendment claim, Pardue alleges that Dist. Atty. Hendrix concealed exculpatory evidence and allowed witnesses to give perjured testimony when he prosecuted Pardue in 1973 for the Baldwin County murder. Hendrix asserts that he is entitled to absolute immunity or qualified immunity.

As the court previously explained, the nature of the immunity depends on the capacity in which the prosecutor is acting at the time of the purported misconduct. Actions taken as an advocate receive absolute immunity, *see Imbler,* 424 U.S. at 430, 96 S. Ct. at 995, while actions taken as an investigator or administrator enjoy only qualified immunity, *see Buckley*, 509 U.S. at 273, 113 S. Ct. at 2615-16. Here, Pardue alleges that Dist. Atty. Hendrix concealed. exculpatory evidence and used perjured testimony "in the course of . . . prosecuting Pardue for the Rider murder." Am. Compl. (doc. 52 ¶ 47).

Moreover, Pardue does not allege any facts which show that Dist. Atty. Hendrix acted in any role other than that of a prosecutor. Accordingly, the court concludes that Dist. Atty. Hendrix is entitled to absolute immunity as to Pardue's Fourteenth Amendment prosecutorial misconduct claim. *See Long v. Satz,* 181 F.3d 1275, 1278 (11th Cir. 1999) (*per curiam*) (prosecutors performing "prosecutorial functions" are entitled to absolute immunity against claim that they failed to disclose exculpatory evidence);

Jones, 174 F.3d at 1289 (extending the doctrine of absolute immunity for those who give perjured testimony to those who procure such testimony).

C. Alleged Conspiracy to Violate 42 U.S.C. § 1983 by Mann, Long, Sennett, Lemlier, Stanard, Hendrix, Graddick, Holloway, Davis and Harrison (Count Two)

In Count Two of the amended complaint, Pardue alleges that in 1973, Officer Mann, Deputy Long, Forensics Spec. Sennett, Investigator Lemlier, Defense Atty. Stanard, Dist. Atty. Hendrix, and Asst. Dist. Attys. Graddick and Holloway conspired to deprive Pardue of the constitutional rights identified in Count One, in violation of 42 U.S.C. § 1983.

Pardue also asserts in Count Two that Asst. Dist. Atty. Holloway conspired with Asst. Dist. Attys. Davis and Harrison in 1995 once again to deprive Pardue of those constitutional rights set forth in Count One, in violation of section 1983.

To state a conspiracy claim under section 1983, a plaintiff must demonstrate (1) that his or her federal rights were violated; (2) that this violation occurred as the result of an agreement among the defendants to violate the plaintiff's federal rights; and (3) that he or she suffered a resulting actionable wrong. *See NAACP v. Hunt,* 891 F.2d 1555, 1563 (11th Cir. 1990). In this case, Pardue contends that Officer Mann, Deputy Long, Forensics Spec. Sennett, Investigator

Lemlier, Defense Atty. Stanard, Dist. Atty. Hendrix, and Asst. Dist. Attys. Graddick, Holloway, Davis, and Harrison "joined, planned and acted upon a conspiracy to violate his Constitutional rights under the Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution." Am. Compl. (doc. 52 ¶ 73). To bolster this assertion, Pardue alleges that these defendants knew of and/or jointly participated in a variety of wrongful acts which culminated in Pardue's wrongful conviction and imprisonment for the Baldwin and Mobile County murders. For example, Pardue asserts that Asst. Dist. Atty. Graddick participated in the conspiracy because "he knew or should have known" that Pardue's confession was coerced and because "he actively joined [Chief Deputy] Travis, [Chief] Pridgen, [Officer] Mann, [Medical Examiner Nelson E.] Grubbs and [Asst. Dist. Atty.] Holloway in presenting false evidence." *Id.* at ¶ 46. Pardue also alleges that Defense Atty. Stanard "joined in, aided and abetted this conspiracy by failing and refusing to provide any semblance of a defense, or any reasonable counsel in the face of clearly inconsistent and irrelevant evidence of Pardue's guilt." *Id.* at ¶ 76. Similarly, Pardue contends that Deputy Long joined the conspiracy by "aiding and abetting others who produced false records and perjured testimony and by standing silent when he knew justice was being obstructed in such a manner." *Id.* at ¶ 62.

Completely absent from Pardue's assertions of joint participation or silent acquiescence, however,

are any specific factual allegations which suggest that the defendants actually agreed to violate Pardue's constitutional rights. "Agreement is the *sine qua non* of a conspiracy" to violate section 1983. *Spencer v. Steinman,* 968 F. Supp. 1011, 1020 (E.D. Pa. 1997). A "prerequisite" to a Section 1983 conspiracy claim is the pleading of "*particularized* allegations that a conspiracy existed." *GJR Investments, Inc. v. County of Escambia,* 132 F.3d 1359, 1370 (11th Cir. 1998) (emphasis added). Thus, "[i]t is not enough that the end result of the parties' independent conduct caused plaintiff harm or even that the alleged perpetrators of the harm acted in conscious parallelism." *Spencer*, 968 F. Supp. at 1020. Instead, "the plaintiff must plead in detail, through reference to material facts, the relationship or nature of the conspiracy." *Harvey v. Harvey*, 949 F.2d 1127, 1133 (11th Cir. 1992). Pardue has offered no such particularized allegations showing that each – or any – of the defendants "'"reached an understanding" to violate [Pardue's] rights.'" *Strength v. Hubert*, 854 F.2d 421, 425 (11th Cir. 1988) (quoting *Dykes v. Hosemann,* 743 F.2d 1488, 1498 (11th Cir. 1984), *cert. denied*, 479 U.S. 983 (1986), *overruled on other grounds, Whiting v. Traylor*, 85 F.3d 581, 584 n.4 (11th Cir. 1996). The vague and conclusory allegations in Pardue's amended complaint do not meet this standard. Pardue's repetitive invocation of the mantras "conspiracy" and "joined in" cannot substitute for particularized allegations that such a conspiracy was entered. *See GJR Investments,* 132 F.3d at 1370-78 (despite numerous pages of factual allegations concerning the defendants'

activities in opposition to the plaintiffs' application and allegations that the defendants conspired and acted in furtherance of the conspiracy, "the complaint fails to make any particularized allegations that a conspiracy existed."). Accordingly, the court concludes that Pardue's section 1983 conspiracy claims are due to be dismissed in their entirety. *See Fullman,* 739 F.2d at 556 ("A complaint may justifiably be dismissed because of the conclusory, vague and general nature of the allegations of conspiracy."); *see also Harris v. Menendez,* 817 F.2d 737, 741 (11th Cir. 1987) ("a naked assertion of conspiracy is an insufficient foundation for a section 1983 claim"), *abrogated on other grounds by Neitzke v. Williams*, 490 U.S. 319, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989).

D. Claims Under 42 U.S.C. § 1983 Against Mobile County, Baldwin County, and the City of Saraland (Count Three)

In Count Three of the amended complaint, Pardue contends that Mobile County, Baldwin County, and the City of Saraland are liable under section 1983 for the constitutional violations that he allegedly suffered in 1973 concerning his interrogation, investigation, and prosecution for the murders of Ronald Rider, Will Harvey Hodges, and Theodore White. Mobile and Baldwin Counties request the court to dismiss this count for failure to state a claim

against them.[45] That said, Pardue's specific allegations in Count Three are the most difficult to decipher in his amended complaint, for some allegations are inconsistent with other allegations, and some allegations are inconsistent with established law. Although Pardue invokes the requisite words and phrases necessary to state a claim against a municipality or county government, he fails to employ them in a legally coherent manner – not a terribly surprising situation given the complexity of the law in this area. Having devoted a great deal of time to making legal sense of Pardue's claims in Count Three, it is apparent from Pardue's allegations in Count Three and his briefing in response to the defendant counties' motions to dismiss that the motions are due to be granted.

It is settled law that a municipality or county is a "person" that may be held liable under section 1983 for the violation of a constitutional right caused by a governmental policy or custom. *See Monell v. Department of Social Services of New York*, 436 U.S. 658, 691, 98 S. Ct. 2018, 2036, 56 L. Ed. 2d 611 (1978); *St. Louis v. Praprotnik*, 485 U.S. 112, 125 n.2, 108 S. Ct. 915, 925 n.2, 99 L. Ed. 2d 107 (1988); *Turquitt v. Jefferson County*, 137 F.3d 1285, 1287 (11th Cir. 1998) (*en banc*). More specifically, local governments may be

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[45] Although the defendant City of Saraland has filed a motion to dismiss, it did not seek relief as to Count Three. Accordingly, the court's discussion in this section is limited to Pardue's claims against the two defendant counties.

held directly liable under section 1983 "for constitutional deprivations resulting from (1) an unconstitutional action taken pursuant to an officially promulgated policy statement, decision, regulation or ordinance; or (2) governmental custom, even though not authorized by written law." *Martinez v. City of Opa-Locka*, 971 F.2d 708, 713 (11th Cir. 1992) (*per curiam*). In certain circumstances, municipal liability may be based upon the single decision of an official policymaker. *See Mandel v. Doe*, 888 F.2d 783, 792 (11th Cir. 1989). In determining whether a county may be liable under section 1983, "[a] court's task is to 'identify those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue.'" *McMillian II*, 520 U.S. at 784-85, 117 S. Ct. at 1736 (quoting *Jett v. Dallas Ind. Sch. Dist.*, 491 U.S. 701, 737, 109 S. Ct. 2702, 2724, 105 L. Ed. 2d 598 (1989)). However, only government officials with "final policymaking authority" may subject the municipality to liability under section 1983 for their actions. *See Bannum, Inc. v. City of Fort Lauderdale*, 901 F.2d 989, 997 (11th Cir. 1990).

1. Baldwin County

In the amended complaint, Pardue claims that Baldwin County Chief Deputy Bobby Stewart created a policy or custom in Baldwin County of "brutally beating confessions out of people whom [he] interrogated and . . . illegally handl[ing] evidence against or

in favor of such persons." Am. Compl. ¶ 82 p. 46.[46] Pardue also alleges that "the Baldwin County Commission created a 'custom or usage' for the type of unconstitutional behavior described in detail herein." *Id.* Additionally, Pardue alleges that "the Baldwin County Commission had the final say, prior to judicial review, over how and to what degree a county employee may be disciplined, suspended, demoted, or terminated." *Id.* at 45-46.

Pardue's allegation that a chief deputy sheriff can be a final policymaker for the county with respect to interrogating suspects and handling evidence is incorrect as a matter of law. In *McMillian v. Monroe County*, 520 U.S. 781, 793, 117 S. Ct. 1734, 1740, 138 L. Ed. 2d 1 (1997) ("*McMillian II*"), the United States Supreme Court specifically held that "Alabama sheriffs, when executing their law enforcement duties, represent the State of Alabama, not their counties." Thus, even if this court were to assume that a chief deputy sheriff (as opposed to the sheriff) could ever be a final policymaker in the area of law enforcement duties, the chief deputy sheriff would only be a final policymaker for the state of Alabama in the area of law enforcement duties, not a county.[47]

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[46] Pardue did not name Chief Deputy Stewart as a defendant in this action.

[47] The court also notes that Pardue's allegations in Count Three are cast so broadly that it could be read to assert that Baldwin County is liable for the acts of the prosecutors because of Chief Deputy Sheriff Stewart's unconstitutional policy

(Continued on following page)

Pardue's suggestions that the Baldwin County Commission created a custom or usage which renders the county liable and that the county commission had the authority to discipline the chief deputy also fail as a matter of law. First, the *McMillian* court specifically concluded ALA. CODE § 36-22-3(4) (the statute which imposes a duty upon the sheriff and his deputies to "ferret out crime," effect arrests, "secure evidence," and present a report of such evidence to the prosecutor) gives Alabama sheriffs

> complete authority to enforce the state criminal law in their counties. In contrast, the "powers and duties" of the counties themselves – creatures of the State who have only the powers granted to them by the States, *Alexander*, 150 So.2d, at 206 – do not include any provision in the area of law enforcement. ALA. CODE § 11-3-11 (1989). Thus, the "governing body" of the counties – which in every Alabama county is the county commission, *see Calvert v. Cullman County Commission*, 669 So.2d 119 (Ala. 1995) (citing § 11-1-5) – cannot instruct the sheriff how to ferret out crime, how to arrest a criminal, or how to secure evidence of a crime.

McMillian II, 520 U.S. at 790, 117 S.Ct. at 1739.

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regarding the handling of evidence. However, Pardue offers no legal support for a claim that a deputy sheriff is the final policymaker for the District Attorney and his staff. Consequently, the court concludes that Pardue has either failed to state such a claim or did not intend for his allegations to read so liberally.

Second, the Alabama state courts have made it clear that a deputy sheriff is simply the alter ego of the sheriff, *Moseley v. Kennedy*, 245 Ala. 448, 17 So.2d 536, 537 (1944), and that the deputy is but a legal extension of the sheriff. *Alexander v. Hatfield*, 652 So.2d 1142 (Ala. 1994).

Third, the Court of Appeals for the Eleventh Circuit concluded more than a decade ago that Alabama county commissioners lack the authority to hire or fire deputies because that authority rests exclusively with the sheriff. *Terry v. Cook*, 866 F.2d 373, 379 (11th Cir. 1989) ("We can find no authority in Alabama law granting the county commission the authority to hire and fire deputy sheriffs, nor have plaintiffs offered any."); *Turquitt v. Jefferson County, Alabama*, 137 F.3d 1285, 1289 (11th Cir. 1998) (citing *Terry*). *See also Lockridge v. Etowah County Commission*, 460 So.2d 1361, 1363 (Ala. Civ. App. 1984) (sheriff's determination that deputy voluntarily quit instead of taking a leave of absence as the deputy contended was not a reviewable decision by the county personnel board).

After consideration of these authorities, the court concludes that Pardue's assertion that Baldwin County is liable as a result of the Baldwin County Commission's failure to "investigate and discipline its merit system employee" (Plf's Resp. to Mot. to Dism., doc. 82, p. 3) thereby creating an unconstitutional "custom or usage" does not state a claim upon which relief can be granted, for neither the defendant county nor the county commission had authority to

discipline Chief Deputy Stewart for his law enforcement activities.[48] That responsibility rested in the sheriff, whose authority derived from the state, not the county. *Streater v. Woodward,* 7 F. Supp. 1215, 1217 (N.D. Ala. 1998) (An Alabama county cannot be held liable for creating a custom of unconstitutional police conduct because the counties "have no direct control over the manner in which sheriffs carry out their law enforcement duties.") (citing *McMillian II,* 520 U.S. at 791, 117 S. Ct. at 1740). Pardue has not identified any legal authority to the contrary.[49]

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[48] It is far from clear what purpose is served by Pardue's allegation that Chief Deputy Stewart was a "merit system employee." As defendant Baldwin County points out in its briefing, the Baldwin County Personnel Board did not exist in 1973, the year Pardue was prosecuted for the Baldwin County murder and thus first encountered Chief Deputy Stewart. To the extent that Pardue alleges that Baldwin County had a merit system in 1973 (even without a Personnel Board), he has not provided any legal authority for the proposition that Baldwin County had the right in 1973 to investigate and discipline a Baldwin County deputy sheriff for law enforcement activities or misconduct.

[49] Pardue asserts that defendant Baldwin County "has been delegated certain duties from the State of Alabama via the legislature. These duties are enumerated and set out for everyone to see in the Baldwin County Commissions [sic] Personnel and Policy and Procedure Manuel." Plf's Resp. to Mot. to Dism. doc. 82 p. 4.

This reference is useless to the court, for Pardue neither quoted the applicable delegated duties nor submitted a copy of the manual. Thus, while the duties may be "set out for everyone to see," Pardue has not brought the duties within the court's visual range.

Accordingly, the court concludes that the motion to dismiss filed by defendant Baldwin County is due to be granted and Baldwin County is due to be dismissed as a party to this action.

2. Mobile County

Pardue essentially asserts the same allegations against Mobile County as he did against Baldwin County, with two notable differences. First, Pardue identifies Chief Deputy Sheriff Bill Travis as the person who brutally beat confessions out of suspects and mishandled evidence.[50] To the extent that Pardue claims that Chief Deputy Travis was the final policymaker, this allegation against Mobile County fails as a matter of law for the same reasons Pardue's claims against Baldwin County failed based on Chief Deputy Stewart.

Second, with respect to its "custom or usage" argument, Pardue identifies not only the Mobile County Commission but also the Mobile County Personnel Board as the entities which purportedly failed to investigate and discipline its classified employee (Chief Deputy Travis), thereby creating a custom or usage of the unconstitutional coerced confessions and mishandled of evidence. As Mobile County points out in its reply brief in support of its motion to dismiss, the Mobile County Personnel

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[50] Pardue did not name Chief Deputy Travis as a defendant in this action.

Board is a separate legal entity which the Alabama Legislature authorized to sue and be sued in its own name. Acts of Alabama, 39-470, p. 298. Clearly, any custom or usage created by the Mobile County Personnel Board cannot be considered to be that of Mobile County.

Accordingly, the court concludes that the motion to dismiss filed by defendant Mobile County is due granted and Mobile County is due to be dismissed as a party to this action.

E. State Law Claims for Malicious Prosecution and Conspiracy to Commit Malicious Prosecution Against Mann, Long, Sennett, Lemlier, Hendrix, Graddick, Holloway, Davis and Harrison (Counts Four and Eight)

In Count Four of the amended complaint, Pardue contends that Officer Mann, Deputy Long, Forensic Spec. Sennett, Investigator Lemlier, Dist. Atty. Hendrix, and Asst. Dist. Attys. Graddick, Holloway, Davis, and Harrison are liable for malicious prosecution under state tort law. In Count Eight of the amended complaint, Pardue alleges that these same defendants conspired to commit the malicious prosecutions identified in Count Four. Except for Investigator Lemlier, each defendant named in Counts Four and Eight has moved to dismiss those counts on one or more of the following grounds: failure to state a

claim, statute of limitations, sovereign immunity, or prosecutorial immunity.[51]

1. Failure to State a Claim

Forensics Spec. Sennett contends that Pardue failed to state a claim for malicious prosecution or for conspiracy to commit malicious prosecution.

a. Malicious Prosecution

As the court explained *supra*, in order to state a claim for malicious prosecution, the plaintiff must allege five elements: (1) a previous judicial proceeding initiated by the current defendant; (2) lack of probable cause in the institution of that proceeding; (3) malice by the current defendant in instituting that

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[51] Although Count Three is the only count in the amended complaint in which Pardue specifically names the City of Saraland and the County of Mobile as defendants, the City and that County have both filed a motion to dismiss Counts Four and Eight, as well as Counts Five (outrage) and Six (wantonness). *See* Mobile County's Renewed Mot. to Dismiss (doc. 55); City of Saraland and Frank Mann's Renewed Mot. to Dismiss (doc. 71). This prophylactic approach is understandable given the rather vague and sometimes confusing nature of Pardue's amended complaint. However, because Pardue has since confirmed that neither local government is being sued under any of the state law claims, *see* Pl.'s Resp. to Def. Mobile County's Mot. to Dismiss (doc. 72 at 7); Pl.'s Resp. to Joint Mot. to Dismiss by City of Saraland and Frank Mann (doc. 81 at 1), the court concludes that these motions are moot to the extent they seek dismissal of Pardue's state law claims.

proceeding; (4) termination of that proceeding in favor of the current plaintiff; and (5) damages to that plaintiff occurring as a result of that proceeding. *See Empiregas*, 524 So. 2d at 627. The only omission Forensic Spec. Sennett suggests is Pardue's failure to specify how Sennett initiated the murder prosecutions against Pardue.

Although this argument successfully defeated Pardue's section 1983 malicious prosecution claim, it does not defeat the state law malicious prosecution claim – the difference being that the heightened pleading standard (applicable to the federal claim) does not apply to state law tort claims. Thus, Pardue need not allege *how* Sennett initiated a judicial proceeding to satisfy the first element of a state law malicious prosecution claim; rather, he need only allege that Sennett in fact *did* so. *See* Fed. R. Civ. P. 8(a) (requiring only "a short and plain statement of the claim showing that the pleader is entitled to relief"). In paragraph 84 of his amended complaint, Pardue contends that certain defendants, including Forensic Spec. Sennett "instituted and/or participated in a conspiracy to institute criminal proceedings against Pardue, or at the ins[iste]nce of . . . Sennett . . . , criminal proceedings were instituted and ultimately terminated in Pardue's favor." This assertion satisfies the first element of a malicious prosecution claim. *See Pace v. Hughes Supply, Inc.*, 743 So. 2d 499, 500 (Ala. Civ. App. 1999) (assertion that present defendant initiated prior judicial proceeding states the first element of malicious prosecution). Accordingly,

the court concludes that Forensic Spec. Sennett's motion to dismiss Count Four is due to be denied.

b. Conspiracy to Commit Malicious Prosecution

Under Alabama law, "[a] civil conspiracy requires a combination of two or more individuals to accomplish an unlawful purpose or to accomplish a lawful end by unlawful means." *McLemore v. Ford Motor Co.*, 628 So. 2d 548, 550 (Ala. 1993). "The essence of a conspiracy is an agreement, a meeting of the minds between the conspirators." *First Bank of Childersburg v. Florey*, 676 So. 2d 324, 327 (Ala. Civ. App. 1996). "By its very nature, the existence of a conspiracy must often be inferred from circumstantial evidence and the relationship of the parties, as opposed to direct evidence." *Eidson v. Olin Corp.*, 527 So. 2d 1283, 1285 (Ala. 1988). Thus, *"[a] great quantum of detail need not be required to be alleged as to the formation of the conspiracy because of the clandestine nature of the scheme or undertaking engaged in."* *O'Dell v. State ex rel. Patterson*, 117 So. 2d 164, 168 (Ala. 1959) (emphasis added).

In Paragraph 93 of the amended complaint, Pardue asserts that Forensics Spec. Sennett and the other defendants named in Count Eight "conspired, combined, confederated and agreed among themselves and with diverse others[,] . . . maliciously and without probable cause therefor, caused Pardue to be arrested, interrogated, indicted, prosecuted and

convicted of the murder charges described herein." While this allegation is not overly detailed, it does not have to be in order to state a claim under state law.[52] Pardue has stated a claim for conspiracy to commit malicious prosecution. Accordingly, the court concludes that Forensic Spec. Sennett's motion to dismiss Count Eight is due to be denied.

2. Statute of Limitations

In Alabama, "[a]ll actions for malicious prosecution must be brought within two years." ALA. CODE § 6-2-38(h) (1975). Relying on this limitations period, Officer Mann contends that any malicious prosecution claims Pardue may have against him have long since expired because Pardue was prosecuted in 1973.[53] The court disagrees. Under Alabama law, the statute of limitations for malicious prosecution does not accrue until the underlying judicial proceeding is terminated in favor of the current plaintiff. *See Barrett Mobile Home Transp., Inc. v. McGugin*, 530 So. 2d 730, 733 (Ala. 1988); *E.R.J. v. L.D.B.*, 702 So. 2d 151, 152 (Ala. Civ. App. 1997). And, as Pardue correctly observes, "a *nolle prosequi* of the charge is a judicial determination which will support the plaintiff's *prima facie* showing of the 'favorable disposition'

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[52] Again, a different result would occur if the heightened pleading standard were applicable to state law claims.

[53] Pardue does not allege that Officer Mann was involved in the 1995 re-prosecution of Pardue for one of the Mobile County murders.

element of a malicious prosecution claim." *Chatman v. Pizitz, Inc.*, 429 So. 2d 969, 971 (Ala. 1983). Here, Pardue argues that the Mobile County murder charges were *nolle prossed* on June 25, 1997 and that the Baldwin County murder charge was *nolle prossed* two months later. Because Pardue filed this action on June 25, 1999 – exactly two years after the first order of dismissal – his malicious prosecution claims are not time-barred.[54] Accordingly, the court concludes that Officer Mann's motion to dismiss Counts Four and Eight is due to be denied.[55]

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[54] The result would obviously be different if the dates on which the appellate courts reversed Pardue's convictions for the murders of Ronald Rider, *see Ex parte Pardue*, 661 So. 2d 268 (Ala. 1994), and Will Harvey Hodges, *see Pardue v. State*, 695 So. 2d 199 (Ala. Crim. App. 1996), rather then the dates on which the murder charges were *nolle prossed*, constituted the ultimate termination of those judicial proceedings. In view of the fact that both cases were reversed and remanded for further proceedings (which contemplates a retrial), the court concludes that neither reversal, by itself, constituted a final determination in Pardue's favor causing his malicious prosecution claims to accrue. *See Smith v. Holtz*, 87 F.3d 108, 113 (3rd Cir. 1996) (reversal of defendant's conviction on evidentiary grounds and remand of the criminal proceedings did not constitute favorable termination). *Crum & Forster. DiBlasio v. City of New York*, 102 F.3d 654, 658 (2nd Cir. 1996) (writ of habeas corpus did not, by itself, satisfy final termination element of malicious prosecution claim).

[55] The denial of Officer Mann's motion to dismiss Counts Four and Eight does not, of course, constitute a finding of fact by the court as to when (or even whether) Pardue's murder charges were dismissed. Rather, the court denied the motion because it is not apparent from the face of the amended complaint that

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3. Sovereign Immunity

The sovereign immunity provision of the Alabama Constitution provides that "the State of Alabama shall never be made a defendant in any court of law or equity." Ala. Const. of 1901, art. I, § 14. In *Ex Parte Purvis*, 689 So. 2d 794 (Ala. 1996), the Supreme Court of Alabama reaffirmed that Alabama sheriffs and their deputies, as state employees, are absolutely immune from suit pursuant to this provision. Here, Deputy Long argues that *Purvis* gives him sovereign immunity as to all of Pardue's state law claims, including Counts Four and Eight, because he was a deputy sheriff during the events in question.

Pardue counters that *Purvis* did not overrule the Alabama Supreme Court's previous holding that "a state officer or employee is not protected by § 14 when he acts willfully, maliciously, illegally, fraudulently, in bad faith, beyond his authority, or under a mistaken interpretation of the law," *Phillips v. Thomas*, 555 So. 2d 81, 83 (Ala. 1989), and he asserts that the state law claims against Deputy Long deal with intentional, malicious, and/or illegal actions that were beyond the scope of his authority as a deputy sheriff. Thus, in Pardue's view, sovereign immunity does not shield Deputy Long from liability for any of the state law claims.

Pardue's malicious prosecution claims are time-barred. Evidence obtained through discovery or offered at trial may establish that Pardue's claims are in fact untimely.

As the Eleventh Circuit has recognized, Alabama courts have offered "no clear answer" to the question whether Alabama sheriffs and their deputies enjoy sovereign immunity for tortious conduct that exceeds mere negligence. *See McMillian v. Johnson*, 101 F.3d 1363, 1365 (11th Cir. 1996) ("*McMillian III*").[56]

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[56] For example, while *Purvis* considered whether the deputies in that case acted "willfully, maliciously, illegally, fraudulently, in bad faith, beyond [their] authority, or under a mistaken interpretation of the law," 689 So. 2d at 795, the court did not address any of those factors two years earlier when it held that a deputy was entitled to sovereign immunity against a "bad faith" service of process claim, *see Alexander v. Hatfield*, 652 So. 2d 1142, 1143 (Ala. 1994). Instead, the *Alexander* court held that the only exceptions to sovereign immunity involve certain requests for injunctive or declaratory relief:

> Under Article I, § 14, of the Alabama Constitution of 1901, the only exceptions to the sovereign immunity of sheriffs are actions brought "(1) to compel him to perform his duties, (2) to compel him to perform ministerial acts, (3) to enjoin him from enforcing unconstitutional laws, (4) to enjoin him from acting in bad faith, fraudulently, beyond his authority, or under mistaken interpretation of the law, or (5) to seek construction of a statute under the Declaratory Judgment Act if he is a necessary party for the construction of the statute."

Id. (quoting *Parker v. Amerson*, 519 So.2d 442, 443 (Ala. 1987)).

Also, in his concurring opinion in *Purvis*, Justice Houston seems to suggest that the equitable exceptions set forth in *Alexander* are the only factors courts should consider in deciding whether to grant an Alabama sheriff or deputy sheriff sovereign immunity: "In this case, the plaintiffs are not seeking injunctive relief or a declaration under the Declaratory Judgment Act. Rather, they are seeking money damages. Therefore, none of the exceptions to a sheriff's or deputy sheriff's sovereign immunity

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Ultimately, however, "[a]ny apparent confusion of the Alabama courts is not important," *Williams v. Goldsmith*, 4 F. Supp.2d 1112, 1128 (M.D. Ala. 1998), because the Eleventh Circuit has held that Alabama sheriffs and deputy sheriff are shielded by sovereign immunity, even in the context of malicious or intentional conduct. *See McMillian III*, 101 F.3d at 1365 (citing *Tinney v. Shores*, 77 F.3d 378, 383 (11th Cir. 1996) (*per curiam*)). "Since the Eleventh Circuit's decisions are binding on this court, its interpretation must be considered by this court to be a correct statement of Alabama law." *Williams*, 4 F. Supp.2d at 1128. Accordingly, the court concludes that Deputy Long is entitled to sovereign immunity as to all state law claims against him, even if those claims are grounded on allegations of intentional, malicious and/or illegal conduct, and that those claims are due to be dismissed.

4. Prosecutorial Immunity

Dist. Atty. Hendrix, joined by Asst. Dist. Attys. Graddick, Holloway, Davis, and Harrison seek dismissal

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under Art. I, § 14, of the Constitution applies." 689 So. 2d at 797 (Houston, J., concurring). Thus, where, as here, a plaintiff brings a claim for monetary damages rather than equitable relief against an Alabama deputy sheriff, it is not clear whether state courts would consider allegations that the deputy acted willfully, maliciously, illegally and/or beyond the scope of his authority during the events in question in deciding whether the sheriff was entitled to sovereign immunity.

of Counts Four and Eight on the ground of absolute prosecutorial immunity. Having determined that Hendrix, Holloway, Davis, and Harrison are entitled to absolute immunity for Pardue's section 1983 malicious prosecution claims, the court concludes that those defendants are also entitled to absolute immunity as to Pardue's state law claims for malicious prosecution and conspiracy to commit malicious prosecution. *See Bogle v. Galanos*, 503 So. 2d 1217, 1219 (Ala. 1987) (upholding dismissal of claims for state law malicious prosecution and underlying conspiracy against Alabama district attorney on basis of absolute immunity and emphasizing "that the immunity under state law in this case is at least as broad as immunity under a § 1983 action.").

As for Asst. Dist. Atty. Graddick, who was not named as a defendant in Pardue's section 1983 malicious prosecution claim, the court concludes that he, too, is entitled to absolute immunity as to Pardue's state law malicious prosecution claim. Pardue asserts that Graddick is liable for malicious prosecution because, on the day of trial, he wrongfully threatened to send Pardue to "the electric chair" if Pardue did not plead guilty to the Mobile County murders. Even assuming that this allegation were true, Graddick is entitled to absolute immunity because he was functioning as an advocate of the State in pursuing a criminal prosecution against Pardue. Accordingly, the court concludes that Asst. Dist. Atty. is entitled to absolute immunity as to Counts Four and Eight. *See*

Almon v. Gibbs, 545 So. 2d 18, 20 (Ala. 1989); *Bogle*, 503 So. 2d at 1219.

F. State Law Claims for Outrage and Wantonness Against Mann, Sennett, Lemlier, Stanard, Hendrix, Graddick, Holloway, Davis and Harrison (Counts Five and Six)

In Counts Five and Six of the amended complaint, Pardue alleges state law claims for outrage, or intentional infliction of emotional distress, and wantonness against Officer Mann, Forensics Spec. Sennett, Investigator Lemlier, Defense Atty. Stanard, Dist. Atty. Hendrix, and Asst. Dist. Attys. Graddick, Holloway, Davis, and Harrison.[57] As with the state law claims for malicious prosecution and conspiracy, each defendant except Investigator Lemlier requests dismissal of Counts Five and Six on one of the following grounds: failure to state a claim, statute of limitations, or prosecutorial immunity.

1. Failure to State a Claim

Forensics Spec. Sennett contends that Pardue failed to state a claim for outrage or wantonness.

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[57] Pardue also names Deputy Long as a defendant in Counts Five and Six. However, the court has previously dismissed all state law claims against him on the basis of sovereign immunity. *See supra* Part V.E.3.

a. Outrage

In Alabama, the elements of the tort of outrage are: (1) that the defendant's conduct was intentional or reckless; (2) that it was extreme and outrageous; and (3) that it caused emotional distress so severe that no reasonable person could be expected to endure it. *See American Road Serv. Co. v. Inmon*, 394 So. 2d 361, 365 (Ala. 1980). Moreover, the conduct must be "so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society." *Jenkins v. United States Fidelity & Guar. Co.*, 698 So. 2d 765, 768 (Ala. 1997).

Often, the dispositive factor is whether the defendant simply made a mistake or acted intentionally or recklessly. *Compare Livingston v. Mobile Mem'l Gardens, Inc.*, 504 So. 2d 256 (Ala. 1987) (cemetery's alleged misrepresentation concerning location of plaintiffs' crypts did not constitute outrage where facts failed to suggest any evil intent) *with Cates v. Taylor*, 428 So. 2d 637 (Ala. 1983) (refusal by cemetery plot's owners to allow burial of plaintiffs' deceased father 30 minutes before funeral was outrageous because defendants knew or should have known their conduct would cause severe distress). *Compare also Peddycoart v. City of Birmingham*, 392 So. 2d 536 (Ala. 1980) (police sergeant's erroneous statement to plaintiffs that their son had committed suicide did not constitute outrageous conduct where evidence revealed that sergeant had simply made a

mistake) *with National Sec. Fire & Cas. Co. v. Bowen*, 447 So.2d 133 (Ala. 1983) (evidence that insurance investigators threatened bodily injury to an insured who had made a claim against the company, forced the insured at gunpoint to drive to the woods, and pointed an unloaded gun at the insured while continually pulling the trigger, supported jury's finding of outrageous conduct).

In this case, Pardue contends that Forensic Spec. Sennett intentionally mischaracterized and suppressed evidence and never informed anyone that his supervisor was preparing forensics reports containing false information regarding the police and prosecution's allegation that the shotgun found at Duncan's home was the murder weapon. These allegations support the conclusion that Forensic Spec. Sennett acted intentionally or recklessly and that he had a desire to inflict extreme emotional distress or that they knew severe emotional distress was likely to result if Pardue was wrongfully convicted of three murders that he did not commit. Because a jury could certainly find that this conduct was "atrocious and utterly intolerable in a civilized society," *Inmon*, 394 So. 2d at 365, and that an innocent person convicted as a result of this conduct would suffer sever emotional distress, these allegations state a claim upon which relief can be granted. Accordingly, the court concludes that Forensic Spec. Sennett's motion to dismiss Pardue's outrageous conduct claim is due to be denied.

b. Wantonness

To be liable for wanton conduct under Alabama law, a defendant must, with reckless indifference to the consequences, consciously and intentionally do some wrongful act or omit some known duty which produces the plaintiff's injury. *See Pate v. Sunset Funeral Home*, 465 So. 2d 347, 349 (Ala. 1984); *see also Lynn Strickland Sales & Serv., Inc. v. Aero-Lane Fabricators, Inc.*, 510 So.2d 142, 145 (Ala. 1987) ("Implicit in wanton, willful, or reckless misconduct is an acting, with knowledge of danger, or with consciousness, that the doing or not doing of some act will likely result in injury."), *overruled on other grounds by Alfa Mut. Ins. Co. v. Roush*, 713 So. 2d 1250 (Ala. 1998). In this case, Pardue's allegations support the conclusion that Forensic Spec. Sennett intentionally suppressed evidence and either knew or was recklessly indifferent to the fact that Pardue could be wrongfully convicted of murder as a result of these actions. Accordingly, the court concludes that Forensic Spec. Sennett's motion to dismiss Count Six is due to be denied.

2. Statute of Limitations

Officer Mann, Forensics Spec. Sennett, Defense Atty. Stanard, Dist. Atty. Hendrix, and Asst. Dist. Attys. Graddick, Holloway, Davis, and Harrison argue that Pardue's outrage and wantonness claims are time-barred by the applicable statute of limitations and the rule of repose. Under Alabama law, the

statute of limitations for outrage and wantonness actions is two years from the date of injury. *See* ALA. CODE § 6-2-38(1) (1975); *Archie v. Enterprise Hosp. & Nursing Home*, 508 So. 2d 693, 695 (Ala. 1987); *Dorsey v. Bowers*, 709 So. 2d 51, 56 (Ala. Civ. App. 1998). The rule of repose, on the other hand, "bars actions that have not been commenced within 20 years from the time they could have been commenced." *Tierce v. Ellis*, 624 So. 2d 553, 554 (Ala. 1993). Both periods start to run when the plaintiff's cause of action accrues. *See Payne v. Alabama Cemetery Ass'n, Inc.*, 413 So. 2d 1067, 1072 (Ala. 1982); *Willis v. Shadow Lawn Mem'l Park*, 709 So. 2d 1241, 1243 (Ala. Civ. App. 1998). The question, then, is whether Pardue's outrage and wantonness claims accrued at least two years before he filed this action on June 25, 1999.

The moving defendants argue that these causes of action accrued in 1973, when Pardue was originally interrogated, indicted, convicted, and imprisoned for the Mobile and Baldwin County murders or in 1995, when he was re-prosecuted and again convicted for one of the Mobile County murders. Under either scenario, they argue, Pardue's claims are time-barred because the claims accrued more than two years before he filed this suit in 1999.

Pardue counters that his outrage and wantonness claims did not accrue until his murder charges were *nolle prossed* in June and August 1997, and he insists that his state law claims are timely because he filed this action exactly two years after the first entry

of *nolle prosequi*. To support this contention, Pardue first relies on a "continuous tort" theory. Under Alabama law, where "a defendant's repeated tortious conduct . . . has repeatedly and continuously injured a plaintiff," *Moon v. Harco Drugs, Inc.*, 435 So. 2d 218, 220 (Ala. 1983), the statute of limitations does not accrue until the last day on which the plaintiff was injured by the defendant. *See Continental Ins. Cas. Co. v. McDonald*, 567 So. 2d 1208, 1216 (Ala. 1990). Here, Pardue argues that the statute of limitations did not begin to run until the murder charges were dismissed in 1997 because the injuries he had suffered since 1973 were continuous up until then. The problem with this argument is that Pardue is confusing continual tortious *conduct* with continual *injury*. It is only the former, not the latter, which tolls the statute of limitations. Under Pardue's theory, for instance, a pedestrian who becomes paralyzed after being struck by a drunk driver could bring suit 10, 20, or even 30 years after the accident because the injury – paralysis – is "continuous." As this example demonstrates, this is not what the continuous tort theory envisions. Because there is no allegation in this case that the defendants' allegedly outrageous and wanton conduct occurred repeatedly, and certainly not within the two years preceding this lawsuit, the court rejects Pardue's continual tort theory.

Pardue next argues that under *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994), he could not bring his outrage and wantonness claims until the murder charges against him

were dismissed. In *Heck*, the Supreme Court held that "to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid," a section 1983 plaintiff must prove that "the conviction or sentence" has been invalidated. *Id.* at 486, 114 S. Ct. at 2372. The defendants respond that *Heck* is inapposite here because that case involved a malicious prosecution claim which, unlike Pardue's claims of outrageous conduct and wantonness, contains as an element the termination of the judicial proceeding in the accused's favor. *See id.* at 484, 114 S. Ct. at 2371 ("One element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused."); *see also Michaels v. New Jersey*, 955 F. Supp. 315, 326 (D. N.J. 1996) (outrage claim against police accrued on date plaintiff was arrested rather date on which her criminal conviction was reversed on appeal). Therefore, defendants argue, Pardue's claims accrued at the time of injury rather than on the dates the State dismissed the murder charges.

With respect to the governmental defendants (Officer Mann, Forensic Spec. Sennett, Dist. Atty. Hendrix, and Asst. Dist. Attys. Graddick, Holloway, Davis, and Harrison), the court disagrees. If Pardue had brought these civil claims prior to the 1997 *nolle prosequi* orders, a verdict in his favor would raise serious doubts about the validity of his murder

convictions because Pardue's allegations directly question the manner in which defendants procured the evidence used to obtain those convictions. As the *Heck* Court recognized, "civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments." 512 U.S. at 486, 114 S. Ct. at 2372; *see also id.* at 490 n.10, 114 S. Ct. at 2374 n.10 (recognizing that the "principle that one cannot use the device of a civil tort action to challenge the validity of an outstanding criminal conviction" is "a longstanding and deeply rooted feature of both the common law and our own jurisprudence"). Accordingly, because Pardue could not use a civil tort action to attack collaterally his murder convictions while they were still in effect, his outrage and wantonness causes of action against the governmental defendants did not accrue until those charges were dismissed. Pardue brought his outrage and wantonness claims within two years of the dismissals; thus those claims are not time barred as to the governmental defendants. Accordingly, the court concludes that the motions to dismiss filed by Officer Mann, Forensic Spec. Sennett, Dist. Atty. Hendrix, and Asst. Dist. Attys. Graddick, Holloway, Davis, and Harrison as to Counts Five and Six are due to be denied.

As to Def. Atty. Stanard, the court reaches the opposite result, for the court is of the opinion that all state tort law claims Pardue might have had against his attorney arose at the same time his claim against Stanard for legal malpractice arose. Without deciding the exact date Pardue's legal malpractice claim arose

against Def. Atty. Stanard, the court concludes that such a claim arose no later than 1992, when the federal court granted his habeas claim and ordered the State of Alabama to permit Perdue to file an out-of-time appeal.[58] Thus, because the statute of limitations for outrage and wantonness is two years and because those causes of action accrued no later than 1992, the court concludes that Def. Atty. Stanard's motion to dismiss the outrage and wantonness claims are due to be dismissed based on statute of limitations grounds.

3. Absolute Immunity

Dist. Atty. Hendrix and Asst. Dist. Attys. Graddick, Holloway, Davis, and Harrison assert that they have absolute immunity as to Pardue's claims for outrageous conduct and wantonness. Except to the extent that these claims are based on the allegation that Asst. Dist. Atty. Holloway fabricated evidence and failed to intervene during Pardue's interrogation, the court agrees that these prosecutors are entitled to absolute immunity as to all allegations of wrongdoing because, as the court has previously concluded, they were functioning as advocates of the State when the alleged wrongful conduct occurred. *See supra* Parts

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[58] Although Def. Atty. Stanard filed a timely appeal on Pardue's behalf in 1973, he later withdrew that appeal without Pardue's consent.

V.B.2., V.E.4.[59] Accordingly, the court concludes that Counts Five and Six as to Hendrix, Graddick, Davis, and Harrison are due to be dismissed. The court also concludes that Counts Five and Six are due to be dismissed as to Holloway except as noted above.

G. State Law Claims for Libel and Slander Against Graddick, Whetstone, and Newcomb (Count Seven)

In Count Seven of the amended complaint, Pardue sets forth a cause of action for libel and slander based on statements that Asst. Dist. Atty. Graddick, Dist. Atty. Whetstone, and Chief Asst. Dist. Atty. Newcomb allegedly made about Pardue to the media after his murder charges were dismissed in 1997. Specifically, Pardue alleges that Graddick told an unidentified news agency that Pardue was a "killer who enjoyed it"; that Whetstone compared Pardue to Ted Bundy and Charles Manson during a national broadcast of the "Leeza Show" and called Pardue a "triple killer" on "Dateline NBC" and other television shows;[60] and that on Fox Network's "Catherine Crier

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[59] Holloway was not functioning as an advocate for the state during Pardue's interrogation or when he allegedly cleaned and oiled the shotgun found at J.B. Duncan's house. Thus, Holloway does not seek, and the court has not granted, absolute immunity concerning Pardue's section 1983 failure-to-intervene and fabrication of evidence claims.

[60] Pardue also alleges that Whetstone gave a confidential probation report to a French news magazine but Pardue does not identify who the subject of the report was.

Show," Newcomb accused Pardue of being a murderer who used technicalities to have his murder convictions *nolle prossed*. Asst. Dist. Atty. Graddick requests a more definite statement, while Dist. Atty. Whetstone and Chief Asst. Dist. Atty. Newcomb argue that these claims should be dismissed because they do not fall within the court's supplemental jurisdiction. Because the court agrees that it lacks jurisdiction over Pardue's libel and slander claims, the court need not address whether Graddick is entitled to a more definite statement.

The supplemental jurisdiction statute provides in relevant part that when a federal district court has original jurisdiction over a civil action, the court also has "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). "The constitutional 'case or controversy' standard confers supplemental jurisdiction over all state claims which arise out of a common nucleus of operative fact with a substantial federal claim." *Lucero v. Trosch*, 121 F.3d 591, 597 (11th Cir. 1997) (citing *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 724-25, 86 S. Ct. 1130, 1138, 16 L. Ed. 2d 218 (1966)). This standard gives federal courts pendent jurisdiction over state claims which arise from the same occurrence and involve the same or similar evidence. *See Palmer v. Hosp. Auth. of Randolph County*, 22 F.3d 1559, 1563-64 (11th Cir. 1994).

In this case, the libel and slander claims are not so related as to form part of the same "case or controversy" as Pardue's section 1983 claims. It is true that the libel and slander claims, like his federal causes of action and his other state law causes of action, ultimately stem from the Mobile and Baldwin County murders. But this is where the similarities end. The defense of truth, which Dist. Atty. Whetstone and Chief Asst. Dist. Atty. Newcomb say they are sure to raise, will require a determination of whether Pardue actually committed the crimes of which he was once accused. Yet the question whether Graddick, Whetstone, and Newcomb were telling the truth when they called Pardue a killer has no common nucleus of operative fact with the question whether the other defendants are liable under section 1983 or the other state law causes of action for allegedly coercing a confession, fabricating evidence, and using perjured testimony. More specifically, Pardue's actual guilt or innocence has nothing to do with whether his constitutional rights were violated. Thus, even though the section 1983 claims and the other state law claims may share the same background with the state law libel and slander claims, it cannot be said that they involve the same or similar evidence sufficient to provide this court with supplemental jurisdiction. Accordingly, the court concludes that Whetstone and Newcomb's motions to dismiss Count Seven are due to be granted. This dismissal includes Pardue's claims in Count Seven against Graddick.

VI. SUMMARY/CONCLUSION

As demonstrated by the sizable length of this memorandum opinion and order, the court has engaged in a detailed analysis of Pardue's numerous claims. For ease of reference, the court provides a brief summary of the claims that have been dismissed, as well as the causes of action that still remain.

A. Count One (Violations of 42 U.S.C. § 1983)

1. Fourth Amendment

It is ORDERED that the motions to dismiss the malicious prosecution claim in Count One filed by Long, Sennett, Hendrix, Holloway, Davis, and Harrison are GRANTED, and those claims are DISMISSED WITH PREJUDICE.[61]

2. Fifth Amendment

It is ORDERED that the motions to dismiss the self-incrimination claim in Count One filed by Long, Sennett, Hendrix, Holloway, Davis, and Harrison are GRANTED, and those claims are DISMISSED WITH PREJUDICE.[62]

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[61] The malicious prosecution claim in Count One remains as to non-movants Mann and Lemlier.

[62] The self-incrimination claim in Count One remains as to non-movants Mann and Lemlier.

It is FURTHER ORDERED that the motions to dismiss the due process, *Miranda*, and *Brady* claims in Count One filed by Long, Sennett, Hendrix, Holloway, Davis, and Harrison are GRANTED, and those claims are DISMISSED WITH PREJUDICE. It is FURTHER ORDERED that the due process, *Miranda*, and *Brady* claims in Count One are DISMISSED *sua sponte* as to Mann and Lemlier, and those claims are DISMISSED WITH PREJUDICE.[63]

3. Eighth Amendment

It is FURTHER ORDERED that the motions to dismiss the cruel and unusual punishment claim in Count One filed by Long, Sennett, Hendrix, Holloway, Davis, and Harrison are GRANTED, and those claims are DISMISSED WITH PREJUDICE. It is FURTHER ORDERED that the cruel and unusual punishment claim in Count One is DISMISSED *sua sponte* as to Mann and Lemlier, and those claims are DISMISSED WITH PREJUDICE.[64]

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[63] As a result of these rulings, the due process, *Miranda*, and *Brady* claims in Count One are dismissed in their entirety.

[64] As a result of these rulings, the cruel and unusual punishment claim in Count One is dismissed in its entirety.

4. Fourteenth Amendment

It is ORDERED that the motion to dismiss the failure-to-intervene claim in Count One filed by Holloway is GRANTED, and that claim is DISMISSED WITH PREJUDICE.

It is ORDERED that the motions to dismiss the *Brady* claim in Count One filed by Long and Sennett are GRANTED, and those claims are DISMISSED WITH PREJUDICE.

It is ORDERED that the motion to dismiss the prosecutorial misconduct claim in Count One filed by Hendrix is GRANTED, and that claim is DISMISSED WITH PREJUDICE.

It is ORDERED that the motion to dismiss the fabrication of evidence claim in Count One filed by Holloway is DENIED.[65]

5. State Constitutional Law and/or State Statutory Claims

It is ORDERED that all allegations that any of the individual defendants are liable under § 1983 for violations of state constitutional law and/or state statutory law are DISMISSED WITH PREJUDICE.

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[65] The excessive force, conditions of confinement, and fabrication of evidence claims in Count One remains as to non-movant Mann.

B. Count Two (Conspiracy to Violate 42 U.S.C. § 1983)

It is ORDERED that the motions to dismiss Count Two filed by Sennett, Stanard, Long, Hendrix, Harrison, Davis, Graddick, Holloway are GRANTED, and those claims are DISMISSED WITH PREJUDICE. It is FURTHER ORDERED that Count Two is DISMISSED *sua sponte* as to Mann and Lemlier, and those claims are DISMISSED WITH PREJUDICE. Accordingly, Count Two is DISMISSED in its entirety.

C. Count Three (Violations of 42 U.S.C. § 1983)

It is ORDERED that Mobile County's motion to dismiss is GRANTED as to Count Three, and that claim is DISMISSED WITH PREJUDICE. It is FURTHER ORDERED that Mobile County's motion to dismiss is MOOT as to Counts Four, Five, Six and Eight. It is FURTHER ORDERED that Mobile County is hereby DISMISSED as a party as it is not named as a defendant in any other counts.

It is ORDERED that Baldwin County's motion to dismiss is GRANTED, and that claim is DISMISSED WITH PREJUDICE. It is FURTHER ORDERED that Baldwin County is hereby DISMISSED as a party as it is not named as a defendant in any other counts.

It is ORDERED that the City of Saraland's motion to dismiss Counts Four, Five, Six, and Eight is MOOT.[66]

D. Count Four (Malicious Prosecution)

It is ORDERED that the motions to dismiss Count Four filed by Long, Hendrix, Graddick, Holloway, Davis, and Harrison are GRANTED. Those claims are DISMISSED WITH PREJUDICE, and those defendants are hereby DISMISSED from Count Four. It is FURTHER ORDERED that the motions to dismiss Count Four filed by Mann and Sennett are DENIED.[67]

E. Count Five (outrage)

It is ORDERED that the motions to dismiss Count Five filed by Long, Stanard, Hendrix, Graddick, Holloway, Davis, and Harrison are GRANTED. Those claims are DISMISSED WITH PREJUDICE, and those defendants are DISMISSED from Count Five. It is FURTHER ORDERED that the motions to dismiss Count Five filed by Mann, Sennett, and Holloway[68] **are DENIED.**[69]

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[66] Count Three remains as to non-movant City of Saraland.

[67] Count Four remains as to non-movant Lemlier.

[68] **As to Count Five, Holloway's motion to dismiss is DENIED to the extent Pardue's outrage claim relies upon**

(Continued on following page)

F. Count Six (Wantonness)

It is ORDERED that the motions to dismiss Count Six filed by Long, Stanard, Hendrix, Graddick, Holloway, Davis, and Harrison are GRANTED. Those claims are DISMISSED WITH PREJUDICE, and those defendants are DISMISSED from Count Six. It is FURTHER ORDERED that the motions to dismiss Count Six filed by Mann, Sennett, and Holloway[70] are DENIED.[71]

G. Count Seven (Libel and Slander)

It is ORDERED that the motions to dismiss Count Seven filed by Graddick, Whetstone, and Newcomb are GRANTED on jurisdictional grounds, and those claims are DISMISSED WITHOUT PREJUDICE. Accordingly, Count Seven is DISMISSED WITHOUT PREJUDICE in its entirety.

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the allegations of evidence fabrication and failure-to-intervene. In all other respects, Holloway's motion to dismiss Count Five is GRANTED.

[69] Count Five remains as to non-movant Lemlier.

[70] **As to Count Six, Holloway's motion to dismiss is DENIED to the extent Pardue's wantonness claim relies upon the allegations of evidence fabrication and failure-to-intervene. In all other respects, Holloway's motion to dismiss Count Six is GRANTED.**

[71] Count Six remains as to non-movant Lemlier.

H. Count Eight (Conspiracy to Commit Malicious Prosecution)

It is ORDERED that the motions to dismiss Count Eight filed by Long, Hendrix, Graddick, Holloway, Davis, and Harrison are GRANTED. Those claims are DISMISSED WITH PREJUDICE, and those defendants are hereby DISMISSED from Count Eight. It is FURTHER ORDERED that the motions to dismiss Count Eight filed by Mann and Sennett are DENIED.[72]

I. Summary of the Complete Dismissals

Count Two is DISMISSED in its entirety. The following defendants are DISMISSED as parties: Mobile County, Baldwin County, Long, Graddick,[73] Harrison, Stanard, Davis, Hendrix,[74] Whetstone, and Newcomb.

VII. Other

The court will address Pardue's motion for leave to amend, defendants' motions for costs and attorneys'

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[72] Count eight remains as to non-movant Lemlier.

[73] **Graddick's motion for a more definite statement is MOOT.**

[74] **Hendrix's motion for a more definite statement is MOOT.**

fees under 42 U.S.C. § 1988, and motion for recusal in separate orders.

DONE this 30 day of May, 2001.

/s/ Richard W. Vollmer, Jr.
RICHARD W. VOLLMER, JR.
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX D

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 07-14757-DD

MICHAEL R. PARDUE,

Plaintiff-Appellant,

versus

MOBILE COUNTY AL,
SARALAND, CITY OF, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of [Alabama]

(Filed Jul. 22, 2008)

ON PETITIONS FOR REHEARING AND
PETITIONS FOR REHEARING EN BANC

Before: DUBINA and BARKETT, Circuit Judges, and SCHLESINGER,* District Judge.

PER CURIAM:

The Petitions for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en

banc (Rule 35, Federal Rules of Appellate Procedure), the Petitions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES
CIRCUIT JUDGE

APPENDIX E

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, in Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of

Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.